Supreme Court, U. S.
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APPENDIX (Volume I)

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner*,

v.

MILTON McCRAY, *Respondent*.

SERGEANT V. D. SMITH, ETC., *Petitioner*,

v.

MILTON McCRAY, *Respondent*.

GERALD McCLELLAN, ET AL., *Petitioners*,

v.

JAMES E. X. STOKES, *Respondent*.

DR. HAROLD M. BOSLOW AND
DR. DOMINGO C. SORONGON, *Petitioners*,

v.

JOHN WASHINGTON, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 9, 1975
CERTIORARI GRANTED NOVEMBER 3, 1975

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

United States District Court for the District of Maryland

McCray v. Burrell — 72-68-N

DOCKET ENTRIES

1972

January 19—(1) Complaint, and affidavit, filed.

January 19—(2) Order (Northrop, C.J.) directing Summons be issued and to be served along with a copy of complaint upon the Office of the Attorney General of Maryland, and granting leave to file in forma pauperis, filed.

January 19—(3) Summons issued. (Served — 1-21-72).

February 9—(4) Supplemental Complaint, filed. (copy to Attorney General of Maryland 2/16/72).

March 14—(5) Motion of Defendant, Warden, Maryland Penitentiary, to Enlarge Time within which to Answer or Other wise Plead and Order (Northrop, C.J.) granting extension of leave to and including April 10, 1972, filed.

April 11—(6) Motion of Defendants and Order of Court (Northrop, C.J.) granting leave for Defendants to answer or otherwise plead until and including 5/1/72, filed.

May—(7) Joint Motion of Defendants in Civil 72-68-N, 72-69-N, and 72-234-N to Dismiss or, in the alternative, Joint Motion for Summary Judgment, Memorandum in support thereof, and Exhibit 1, filed. (3 copies to Judge).

May 31—(8) Notice of Plaintiff to take Deposition of Robert T. Coulter, Executive Director of the Inmate Grievance Commission, upon Oral Examination, filed.

June 6—(9) Motion of Plaintiff to record deposition by other than stenographic means, Memorandum of Points and Authorities in support thereof, and Order of Court (Northrop, C.J.) granting leave as prayed, filed.

June 26—(10) Memorandum of Plaintiff inopposition to Defendants' Motion to Dismiss and Motion for Summary Judgment, Exhibit 1 and 1A, filed. (2 copies to Judge).

June 26—(11) Motion of Plaintiff for leave of Court to filed amended complaint dropping one defendant and adding two other defendants and reformulating the issues, Exhibits A, B, and proposed Order, filed. (2 copies to Judge).

December 13—Status Conference held before Northrop, C.J.

1973

February 14—(12) Appearance of Charles F. Morgan, Esquire, as counsel for Plaintiff, Order, filed.

June 1—(13) Motion of Plaintiff and Order (Northrop, C.J.) that Defendants Produce for Inspection and Copying the Documents therein referred to, filed.

June 1—Status Conference held before Northrop, C.J.

June 6—(14) Writ of Habeas Corpus Ad Testificandum Issued.

June 11—(15) Appearance of Michael S. Elder, Esquire, as Counsel for Plaintiff, Order, filed.

June 11—Plaintiff's Oral Request for Jury Trial Denied by the Court.

June 11—Hearing on Motion of Defendants to Dismiss or, in the alternative, Motion for Summary Judgment before Northrop, C.J.

June 11—Argument of Counsel.

June 11—Not concluded.

June 13—(16) Answer of Defendant Mr. Burrell, Hearing Officer to Amended Complaint, filed.

June 13—Case tried before the Court (Northrop, C.J.).

June 13—Not Concluded.

June 14—Trial Resumed.

June 14—Held Sub Curia — Briefs to be submitted.

June 26—(17) Motion of Plaintiff for leave to amend complaint, amended complaint, and Order (Northrop, C.J.) granting leave to amend complaint, filed.

July 11—(18) Petition of Plaintiff for Issuance of a Subpoena at the expense of the United States of America and Order (Young, J.) nunc pro tunc thereon.

July 11—(19) Stipulation of Counsel that the Copies of attached Orders of the Maryland Inmate Grievance Commission listed herein may be considered as Plaintiff's Evidence. (Filed separately).

July 11—(20) Supplemental Memorandum of Defendant and Copies of Orders of Maryland Inmate Grievance Commission attached.

August 17—(21) Motion of Plaintiff, Milton McCray, for leave to produce additional evidence, and Attachments. (cys, submitted).

August 17—(22) Order (Northrop, C.J.) Denying Plaintiff's Motion for Leave to Produce Additional Evidence. (Copies mailed 8-21-73 now).

October 16—(23) Opinion and Order of Court (Northrop, C.J.) that the Defendants' Motion to Dismiss be and the same is hereby "Denied"; that plaintiff's claim for relief be and the same is hereby "Denied"; Attachments thereto. (Filed Separately).

October 24—Status Conference held before Northrop, C.J.

November 2—(24) Order (Northrop, C.J.) Amending Opinion of this Court dated October 16, 1973 and Directing Clerk to Enter Judgment.

November 5—(25) Judgment (Clerk) Granting Defendant's Motion to Dismiss, and Denying Plaintiff's claim for Relief. (Copies mailed to Plaintiff and to Counsel 11-5-73 now) closed.

November 30—(26) Notice of Appeal of Plaintiff. (copies mailed by Clerk — 11-30-73).

December 12—(27) Motion of Plaintiff and Order (Northrop, C.J.) directing Official Court Reporter to prepare and furnish the transcript of proceedings, as therein set forth, pursuant to U.S.C., Title 28, Section 753(f).

United States District Court for the District of Maryland

McCray v. Smith — 72-234-N

DOCKET ENTRIES

1972

March 7—(1) Complaint, Affidavit and attachments, filed.

March 7—(2) Order of Court (Northrop, CJ) granting leave to file in forma pauperis, directing Clerk to docket complaint without payment of filing fee; and also to issue a summons as therein set forth, filed.

March 7—(3) Summons issued. (Served 3/9/72)

March 16—(4) Motion of Defendant and Order (Northrop, CJ) granting leave to extend time for Defendant to answer or otherwise plead until and including 4/17/72, filed.

April 10—(5) Motion of Defendants and Order (Northrop, CJ) granting leave to extend time for Defendants to answer or otherwise plead until and including 5/1/72, filed.

* * * * * *

May 1—(6) Joint Motion of Defendants in Civil 72-68N, 72-69N and 72-234N to dismiss, or in the alternative, Joint Motion for Summary Judgment, Memorandum in support thereof, and Exhibit 1, filed. (3 copies to Judge).

* * * * * *

April 19—(5A) Motion of Plaintiff for Relief Requested to be Immediately granted, etc., filed.

May 1—(7) Notice (copy) of Plaintiff to take Deposition of Robert T. Coulter, Executive Director of the Inmate Grievance Commission, upon Oral Examination, filed. (Original filed in 72-68-N).

June 6—(8) Motion of Plaintiff to record deposition by other than stenographic means, Memorandum of Points and Authorities in support thereof, and Order of Court (Northrop, C.J.) granting leave as prayed, filed. (Original filed in 72-68-N)

Dec. 13—Status Conference held before Northrop, C.J.

1973

February 14—(9) Appearance of Charles F. Morgan, Esquire, as counsel for Plaintiff, Order, filed.

June 1—Motion of Plaintiff and Order (Northrop, C.J.) that Defendant Produce for Inspection and Copying the Documents therein referred to, filed. (See Paper No. 13 in Civil No. 72-68).

June 1—Status Conference held before Northrop, C.J.

June 6—(10) Writ of Habeas Corpus Ad Testificandum Issued.

June 11—(11) Appearance of Michael S. Elder, Esquire as Counsel for Plaintiff, Order, filed.

June 11—Plaintiff's Oral Request for Jury Trial Denied by the Court.

June 11—Hearing on Motion of Defendant to Dismiss or, in the alternative, Motion for Summary Judgment before Northrop, C. J.

June 11—Argument of Counsel.

June 11—Not concluded.

June 12—Case tried before the Court, Northrop, C.J.

June 12—Oral Motion of Defendant to Dismiss heard and Denied by the Court at the close of Plaintiff's Evidence.

June 12—Not concluded.

June 13—(12) Answer to Complaint, filed.

June 13—Trial Resumed.

June 13—Briefs to be submitted on or before June 21, 1973.

July 11—Stipulation of Counsel that Copies of the Attached Orders of the Maryland Inmate Grievance Commission may be considered as Plaintiff's Evidence. (See Paper No. 19 in Civil No. 72-68-N).

July 11—Supplemental Memorandum of Defendant and Copies of Orders of the Maryland Inmate Grievance Commission. (See Paper No. 20 in Civil No. 72-68-N).

Aug. 17—Motion of Plaintiff, Milton McCray, for leave to produce additional evidence, and Attachments. (See Paper No. 21- Civil No. 72-68-N).

August 17—Order (Northrop, C.J.) Denying Plaintiff's Motion for Leave to Produce Additional Evidence. (See Paper No. 22 in Civil No. 72-68-N).

October 16—(13) Opinion and Order of Court (Northrop, C.J.) that defendants' Motion to Dismiss be and the same is hereby "Denied"; that plaintiff's claim for relief be and the same is hereby "Denied"; Attachments thereto. (Filed separately).

October 24—Status Conference held before Northrop, C.J.

November 2—Order (Northrop, C.J.) Amending Opinion of this Court dated October 16, 1973 and Directing Clerk to enter Judgment. (See Paper No. 24 in Civil Action No. 72-68-N).

November 5—(14) Judgment (Clerk) Granting Defendant's Motion to Dismiss, and Denying Plaintiff's Claim for Relief. (Copies mailed to Plaintiff and to Counsel 11-5-73 now) Closed.

November 30—(15) Notice of Appeal of Petitioner. (copies mailed by Clerk — 11-30-73).

December 2—Copy of Motion of Plaintiff and Order (Northrop, C.J.) directing Official Court Reporter to prepare and furnish the transcript of proceedings, as therein set forth, pursuant to U.S.C., Title 28, Section 753(f). (Original filed in No. 72-68-N Civil Docket — Paper No. 27).

In the United States District Court
For the District of Maryland

Civil No. 72-68-N

Filed January 19, 1972

To the Honorable Judge of Court,

On January 1, 1972 Petitioner, Milton McCray's cell caught on fire, resulting from a lit cigarette falling from his hand into some paper while he was asleep. When he woke up his cell was blazing.

A officer ran up to the door with a fire extinguisher but nothing would come out.

PETITIONER CONTENDS

1. That the officer deliberately brought the empty fire extinguisher to his door knowing that it was empty. He could not help but know it was when he picked it up.

2. That said officer after finding out that said extinguisher was empty ran away and stayed for an eternity. The fire extinguisher being empty almost cost Petitioner his life.

3. That the Officers deliberately took their time putting the fire out, causing him to suffer first degree burns on the face, ears, hand, and arms. He is also having lung trouble.

4. That he has been denied medical treatment for two weeks.

5. That he has been laying on the floor suffering for over two weeks because no doctor would treat him.

6. That each doctor that saw him referred him to another doctor therefore no treatment was received, administered.

7. That because of the doctors deliberate spiteful and unprofessional negligence Petitioner has suffered much pain.

8. That because of the deliberate negligence of the persons responsible the empty fire extinguisher has caused petitioner to suffer unnecessarily.

Wherefore Petitioner pray that this Honorable Court will award him his immediate release and $500,000 in damages.

MILTON MCCRAY

I, hereby, certify due to his poverty, he is unable to pay the cost of this proceeding or give security therefor.

MILTON MCCRAY

In the United States District Court
for the District of Maryland

Civil No. 72-68-N

(Filed February 9, 1972)

Captain Burrell and
Md. Penitentiary Medical Staff
Respondent.

SUIT

Jurisdiction 28 U.S.C. 1343 (3). 42 U.S.C. 1983

To the Honorable Judge of said Court:

On January 1, 1972, Petitioner, Milton McCray's cell caught on fire while Petitioner was in bed asleep, cell door was locked, the cell was totally burnt, walls, bed, mattress, books, papers, etc. it is said that Petitioner was super-lucky to have gotten out alive.

Petitioner suffered burns of the face, eyes, nose, both ears, arm and hand, and swallowed a very great deal of smoke making breathing almost impossible. Petitioner was rushed to the Hospital (institution) where an Officer who has absolutely no authority as a doctor or experience in Medicine, placed cold water pads on petitioner's face and gave him something red to drink and then said lock him in the blue room, Capt. Barrell's orders, until the doctor is located. The blue room consists of ten cells, the window is covered completely with a metal plate, no sink. Petitioner was forced *nude*, in severe pain, with only the hard cement floor to sleep on Capt. Barrell ordered all shifts not to give Petitioner anything until he saw the doctor.

All Saturday and Sunday petitioner laid on the hard cement floor in unbearable pain, petitioner asked, even begged the officer on all shifts for aid, each told him that he must wait to see the doctor, petitioner asked for cough medicine, each officer stated he couldn't give him anything until he saw the doctor, petitioner asked for a bath, same answer.

Tonight is Tuesday January 4, 1972, four (4) days since petitioner was burnt, no doctor has examined petitioner.

Treatment of this kind cannot, I repeat cannot be tolerated, it must not be tolerated, it is the duty of this court to bring an end to the cruel unusual and barbaric treatment, punishment perpetrated vindictively without care or concern for helpless inmates who are completely at the mercy of captains such as Capt. Burrell who acts out of his authority arbitrarily and capriciously, to, the detriment of inmates under his care.

The inmates of this institution through the petitioner, Milton McCray, in this petition entreat this Honorable court to hear this petition and bring an end to this cruel treatment.

Petitioner contends

1. That he was completely refused, cruelly spitefully refused and unconstitutionally refused medical treatment for serious burns of face, eyes, arms, hands, both ears, and chest.

2. That he was placed in the blue room nude in pain with only the cement floor to sleep on, with no toilet, no sink, no hot or cold water, no fresh air inlet, no stale air outlet.

3. That he has not been permitted a bath since 29th of December 1971, still has had no bath or is permitted one.

4. That his entire body is filled with smoke in side and out and no one cares.

5. That he is being held incommunicado, refused legal papers, books, pen and writing paper for all purposes including court, attorney, Warden, Commissioner, Secretary of Public Safety.

6. That he was refused food.

7. That his food and his Black Muslin Religion food is improperly prepared.

8. That a doctor should be on duty twenty-four hours a day in an institution of this capacity.

9. That a particular day is a Holiday is the most absurd, preposterous excuse for this institution not to have a doctor on duty or call.

10. That if it had not been for inmates illegally getting a call out to petitioner's Mother and Wife, and petitioner's Mother immediately calling Capt. Burrell and laying him out, petitioner would have been left to *die* in the blue room.

11. That his face was burnt so badly, he could hardly recognize his self nothing short of a plastic surgery will repair the damage done to his face by Capt. Burrell's contributory negligence, the institution contributory negligence.

Petitioner prays that this Honorable Court immediately order him expert medical treatment, and that Captain Burrell be personally penalized for his cruel and spiteful act.

The State should not be solely responsible for deliberate, spiteful act on the part of its' officers.

Petitioner should be released from custody and a sum of $500.000 be awarded to him for the severe pain and misery he has suffered, is suffering and will suffer, as the result of the gross contributory negligence he is the victim of.

MILTON MCCRAY,
Petitioner, Milton McCray.

I, Milton McCray, hereby certify that I am indigent, without funds to pay for any of the proceedings involved in processing this petition.

MILTON MCCRAY,
Milton McCray 110-563.

In the United States District Court
for The District of Maryland

Civil No. 72-234-N

Milton McCray (110-563)
v.
Sergeant V. D. Smith (Badge No. 153)
Md. Penitentiary

(Filed March 7, 1972)

SUIT

Jurisdiction exist under 28 u. 5. c s 1343(3). Which Provides: "The District court shall have original Jurisdiction of any civil action authorized By law to be commsed by any person:

"(3) To redress the deprivation under the color of any state law, statute, ordinance, Regulation, custom or usage, of any right, privileged or immunity secured by the constitution of the U.S. or by any act of congress provided for equal rights of citizens or of all person within the jurisdiction of the United States:

See: Sostre v. McDinnis, F.2d — (2 Cir. 1971):

Johnson v. Avery, 393 U.S. 483 (1969) Lee v. Washington, 390 U.S. 333 (1968); Houghton v. Shafer, 392 U.S. 639 (1968); Sewell v. Pegelow, 291 F.2d 196, 198 (4).

Cir. (1967). exhaustion of state, legal or equitable remedies is not Necessary. Sostre v. Rockefellow (1970): Gordon v. Fitzharris, (1966). Sostre v. McAinnis F.2d (2 Cir. Feb, 24, 1971)

Statement of Facts

On Wednesday, November 17, 1971 Petitioner, Milton McCray, an inmate at the Maryland Penitentiary was severely beaten by Major Mills and five or six Officers in the isolated office with a telephone book and Life, Look Magazines about the body and head than stripped him of his clothing and throw Petitioner in a cell which was fill with lice and lousy cell. He was taken from said cell and placed in the hole without a Mattress or blanket necessitating sleep on the cold hard concrete floor. Sergeant Smith refused to let McCray see the Doctor.

On Thursday November 18, 1971 the assist Warden was notified. McCray explained what had happened. The assist Warden order him sprayed and deliced, taken out of the hole and given law books, Sergeant Smith told the Warden to his face that he was not going to do nothing for me.

On Friday November 19, 1971 the Sergeant still refused to give me my legal, papers, pen etc. and my medication. He refused to call the Doctor concerning the headaches resulting from being beaten by the Major and officers with the phone book and magazines. McCray's headaches became so unbearable, he could not stand it so he started calling the officer for some kind of medical attention, instead six officer's led by Sergeant Smith who order me dragged out of my cell down four flights of stairs to the hole where all clothing was ripped of and I was dragged into the hole nude, Sergeant Smith then ask me if I still wanted a shower, I said yes. He went away and came back with two buckets of water and threw them on me saying now sleep in it", I almost froze standing in the water for seemingly an eternity, Finally he got an inmate to mop the water up and give me a mattress to stand on until the water dry however he would not give me any thing to dry off with or clothing to put on. Nor would he turn that fan off me. I waited until the shift changed hoping that I could get some clothing, a blanket and the fan cut off. The officer on the next shift refused to give me a blanket or clothing however after many, many request

the officer did turn the fan off which made the coldness a little more bearable nevertheless at about ten or eleven o'clock I could stand it no longer. Therefore I tore a hole in the filthy mattress and slide between the cotton to get and keep warm. I went to sleep. Monday November 22, 1971 still no medicated shower, law books, tooth brush, paste, etc. Tuesday November 23, 1971 I finally saw the Doctor who inquired into the original reason for me being on segregation of Capt. Beaver and Sergeant Smith no one knew, the Doctor ordered showers daily and X-rays taken. Wednesday November 24, 1971 no showers, legal books, paper stamps, tooth brush, paste, etc. but I did received a X-ray of the chest, head and side, result unknown, I received thirty days on segregation and the lost of 10 days good conduct and working time for tearing the mattress to keep warm. Which is very unreasonable considering Hon. Judge Roszel Thompson orders in Bundy v. Cannon (4th District 1971).

Thursday 25, 1971 refused legal books, paper, pen, etc. tooth paste, brush, etc. and medicatal shower, etc.

The following conditions treatment, separately and together, amount to violations of my constitutional rights

(I) segregation and solitary confinement.

(A) that petitioner were not afforded a proper administrative hearing conducted according to provisions embodying procedural due process before the mattress infraction or after.

(B) Petitioner is totally and separately day and nite in a unventilated and unheated cell approximately (7" X 9") for approximately (23½ hours) a day seven days a week.

(C) each cell is without hot water.

(D) the cell and their contents are rarely cleaned and as result are encrusted with dirt and waste materials,

(E) Mattresses are filthy, ragged and odered.

(F) Each cell is infested with cockroaches and unknown bugs, one cell I from personal experience know has lice. Consequently petitioner suffer from roach etc. bites,

(2) Petitioner was brutally attacked and assaulted by Major Mills and Staff Personnel,

(G) petitioner is denied the opportunity to maintain physical health.

(3) Petitioner was spitefully denied medical attention by Major Mills and Sergeant Smith,

(4) petitioner was denied access to the courts for a prolonged period of time.

(5) Negligent and unsanitary handling and serving of food and failure to provide adequate diet in quantity and quality,

(6) Unreasonable and arbitrary restriction on visiting.

(7) Unreasonable censorship of mail.

(9) No radios permitted and no earphone are issued. Ninety five percent of the earphone boxes are disconnected resulting in very little awareness of what is going on in the world.

(10) Petitioner was forced to serve (30) days on segregation for minor rule infraction in deliberate violation of the order of Hon. Judge Roszel Thompson see Brady et al. v. Cannon et al., (Daily Record March, 2, 1971).

Petitioner is suffering physical and mental inhuman treatment under aforesaid conditions. Therefore petitioner prays injunctive relief, and physical release, petitioner further pray pursuant to 42 U.S.C.

(1983) and (28 U.S.C.) (1343) (3) damages of $500.00 for the cruel attack upon him by Major Mills and Staff personnel maliciously vindictively and spitefully, without Justification which resulted in constant severe headaches and blackout

and his refusal to permit petitioner medical treatment. Petitioner became sick, sore and disordered and so remained for a long time. to wit: from thence hitherto up to and including this and I Milton McCray hereby certify that I am indigent without sufficient fund to pay for competant counsel to prosecute the petition or any or the proceeding involved in processing this petition,

MILTON MCCRAY,
In proper person
Milton McCray 110-563

If there is any doubt as to whether violations of the fourteenth amendments by the states officers or agencies, acting in their official capacities, maybe enjoined by the Federal courts. One need only turn to Baker v. Carr, 369 U.S. 186, 8LS ct 691, 7 L. Ed. 2d 663 (1962) and it progeny E. G. Well v. Rockefeller, 273 F. Supp 184 (S.d. N.Y.) Aff'd 389 U.S. 421.88 Sct. 578 19 L. Ed 651 (1967).

Then there is if any doubt as to whether a federal court can award damages against Officials in their Official capacities despite the eleventh amendment. See: Thompson Jordan v. Fitzharris 257, F. Supp 674 (1966) C. C. Governor.

Secretary of Public Safety Mr. Lally
Warden
Major Mills
Sgt. Smith
United States District Court for Maryland

MILTON MCCRAY,
Petitioner sign here Milton McCray 110-563

In the United States District Court
for the District of Maryland

Milton McCray
954 Forrest Street
Baltimore, Maryland 21202,
Plaintiff,

v.

Robert Burrell
Maryland Division of Correction
920 Greenmount Avenue
Baltimore, Maryland 21202,
Defendant.

Civil Action No. 72-68-N

COMPLAINT FOR COMPENSATORY AND PUNITIVE DAMAGES

JURISDICTION

1. Jurisdiction of the Court is invoked pursuant to and in accordance with the provisions of Title 28, United States Code, §§ 1343(3) and (4), Title 42, United States Code, § 1983, and the Constitution of the United States in particular, but not limited to the Eighth, and Fourteenth Amendments thereto.

2. The matter in controversy exceeds, exclusive of interests and costs the sum or value of Ten Thousand Dollars ($10,000.00).

PARTIES

3. The Plaintiff, Milton McCray, is a citizen of the United States, over twenty-one years of age and a resident of Maryland. He is presently incarcerated at the Maryland Penitentiary, 954 Forrest Street, Baltimore, Maryland 21202.

4. Defendant Robert Burrell is employed by the Division of Correction as a hearing officer. During all times mentioned herein, Defendant Burrell was a captain at the Maryland Penitentiary and was responsible for supervising the day shift of the Maryland Penitentiary.

NATURE OF THE ACTION

5. This action, which is authorized by Title 42, U.S.C., § 1983, seeks to recover compensatory and punitive monetary damages for the deprivation under color of law of the rights, privileges and immunities guaranteed by the United States Constitution to the Plaintiff. Specifically, the Plaintiff challenges the constitutionality of the acts of Defendant Burrell, who acted willfully, maliciously and intentionally as well as negligently and recklessly and without authority of law, and with the specific intent to deprive the plaintiff of his right to:

a) Be free from physical abuse and cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution;

b) Be free from arbitrary punishment and abuses as guaranteed by the due process clause of the Fourteenth Amendment;

c) The privileges, rights and immunities afforded by other provisions of the United States Constitution.

STATEMENT OF CASE

6. On the morning of January 1, 1972, the Plaintiff Milton McCray was confined in a segregation cell (#325) on the third tier of the South Wing of the Maryland Penitentiary. At approximately nine a.m., several Correctional Officers working in the South Wing of the Maryland Penitentiary noticed that the Plaintiff's cell was on fire. Although, they attempted to put the fire out, the fire extinguisher they were using would not function properly and therefore they had to wait until another correctional officer, Mr. Wharton,

arrived with an extinguisher that was functioning properly. Once the fire was under control, Correctional Officers Jackson and Wharton were instructed by Defendant Burrell, who on January 1, 1972, was a captain and the supervisor of the day shift in the Maryland Penitentiary, to escort the Plaintiff to the medical dispensary unit so that the nurse could check him for any injuries and then to make sure that the Plaintiff was placed in a medical observation cell.

7. At the medical dispensary unit, the Plaintiff was seen by a nurse, Mrs. Weber and a correctional officer, Mr. Martin, who applied cold compresses to his eyes and ears and bacitracin ointment to all areas stated by the Plaintiff to have been burned or injured.

8. The Plaintiff was then, pursuant to the orders of Defendant Burrell, placed nude in a bare cement "strip" cell which had no mattress, blankets, or proper hygienic facilities (a strip cell containing only a hole for a toilet and no sink).

9. Later that morning, Dr. Holljes, a Maryland Penitentiary physician, was advised of Plaintiff's condition and he instructed the nurse to call Dr. Stewart, another Penitentiary physician. However, Dr. Stewart could not be reached at his home or office and thus the Plaintiff was not seen or examined by a doctor during that day January 1, 1972, or the following day.

10. Thereafter, on January 3, 1972, the Plaintiff was finally released from this "strip" cell by Dr. Campbell, a Maryland that he was able to see a Dr. William Gould, a dermatologist, who that he was able to see a Dr. William Gould, a dermatologist, who, diagnosed his injuries as first degree burns with some secondary pyoderma on the face.

11. As a direct result of the unlawful refusal of the Defendant to insure that a doctor is on duty at all times at the Maryland Penitentiary, or in the alternative to insure that the injured Plaintiff was taken to a doctor or hospital, outside of the Penitentiary, the Plaintiff was caused to suffer extreme physical pain, emotional anguish and injury to his face, ears, arms and hands.

12. In addition, the unlawful and intentional actions of Defendant Burrell, who is being sued individually and in his official capacity, caused the injured Plaintiff to be placed in a cold barren cell without any clothing. As a direct result of these unlawful acts, the Plaintiff was caused to suffer additional physical pain, emotional anguish; and his injuries to his face, ears, arms and hands were made more severe.

13. The unlawful acts detailed in the above paragraphs, were intended by the Defendant to deprive the Plaintiff of due process and equal protection of the law, and the privileges and immunities of citizens secured by the Fourteenth Amendment to the Constitution of the United States. Furthermore, these acts which were carried out under color of state law constituted cruel and unusual punishment in abrogation of the Eighth Amendment to the United States Constitution.

First Claim

14. The failure of the Defendant to insure that a doctor and reasonable medical attention was accessible to Plaintiff when his physical condition so required; and the unlawful action of the Defendant of ordering the injured Plaintiff to be placed in a cold barren "strip" cell without any clothing or bedding has denied the Plaintiff's right to be free from arbitrary denials of life and liberty in contravention of the Fourteenth Amendment to the United States Constitution.

Second Claim

15. The failure of the Defendant to provide that a doctor would be accessible to the Plaintiff, when his condition so required, and the placement of the Plaintiff in the "strip" cell when the Defendant knew that the Plaintiff was injured and in great pain and that the cold cement cell would aggravate these injuries was a denial of the Plaintiff's right to be free from cruel and unusual punishment in violation of his Eighth Amendment rights.

WHEREFORE, Plaintiff respectfully requests this Court to order that Defendant Burrell compensate the Plaintiff in the amount of Five Thousand Dollars ($5,000.00) for compensatory damages and Ten Thousand Dollars ($10,000.00) for punitive damages, plus the costs of this action, and to grant such other relief that this Court deems necessary or appropriate.

Respectfully submitted,

CHARLES F. MORGAN,
MICHAEL S. ELDER,
341 North Calvert Street
Baltimore, Maryland 21202
539-5340,
Attorneys for Plaintiff.

In the United States District Court
for the District of Maryland

Civil Action No. 72-68-N

Milton McCray,
Plaintiff,
v.
Mr. Burrell, Hearing Officer,
Mr. Gerald H. McClellan, Warden,
Maryland Penitentiary,
James Jordan, Commissioner, Division of Correction,
and
Robert J. Lally, Secretary, Department of Public Safety
and Correctional Services,
Defendants.

ANSWER OF MR. BURRELL, HEARING OFFICER

Mr. Burrell, Hearing Officer, by his attorneys, Francis B. Burch, Attorney General, John P. Stafford, Jr. and Gilbert Rosenthal, Assistant Attorneys General, in answer to the claim filed by the Plaintiff, respectfully states in answer to the Statement of Case filed in the Amended Complaint, respectfully states the following:

First Defense

The complaint fails to state a claim against Defendant, Mr. Burrell, upon which relief can be granted.

Second Defense

1. In answer to Paragraph 10, the Defendant alleges that he was not personally present, and therefore is without knowledge or information sufficient to form a belief that to the truth of the allegations contained in Paragraphs 10, 11, 13, 14 and 15.

2. In answer to Paragraph 12, the Defendant believes that he may have ordered the Plaintiff to be placed in a

cell which had no mattress or blankets, but the Defendant denies that there were improper hygenic facilities.

3. In answer to Paragraph 16, the Defendant denies that he acted in an unlawful or intentional action to cause the Plaintiff to suffer physical pain, emotional anguish, or any other allegation contained in Paragraph 17 of the Complaint.

WHEREFORE, the Defendant, Mr. Burrell, prays the above action to be dismissed.

FRANCIS B. BURCH,
Attorney General,
JOHN P. STAFFORD, JR.,
Assistant Attorney General,
GILBERT ROSENTHAL,
Assistant Attorney General
One South Calvert Building
Baltimore, Maryland 21202
Telephone — 383-3737
Attorneys for Defendants.

I HEREBY CERTIFY that on this day of June, 1973, a copy of the foregoing Answer of Mr. Burrell, Hearing Officer, was mailed, postage prepaid, to Charles F. Morgan, Esq., 341 North Calvert Street, Baltimore, Maryland 21202, Attorney for Plaintiff.

GILBERT ROSENTHAL,
Assistant Attorney General.

In the United States District Court
for the District of Maryland

Civil Action No. 72-234-N

Milton McCray,
Plaintiff,
v.
Sergeant V. D. Smith (Badge No. 153 — Maryland Penitentiary),
Defendant.

ANSWER OF SERGEANT V. D. SMITH

Sergeant V. D. Smith (Badge No. 153 — Maryland Penitentiary) by his attorneys, Francis B. Burch, Attorney General; John P. Stafford, Jr. and Gilbert Rosenthal, Assistant Attorneys General, in answer to the claim filed by the Plaintiff, respectfully states in answer to the Statement of Case filed in the Amended Complaint, respectfully states the following:

First Defense

The Complaint fails to state a claim against Defendant, Sergeant V. D. Smith, upon which relief can be granted.

Second Defense

That in each and every allegation in the Plaintiff's Complaint, which the Defendant, Sergeant V. D. Smith, has personal knowledge, the Defendant denies each and every allegation contained in the Complaint.

WHEREFORE, the Defendant, Sergeant V. D. Smith, prays the above action to be dismissed.

FRANCIS B. BURCH,
Attorney General
JOHN P. STAFFORD, JR.,
Assistant Attorney General,
GILBERT ROSENTHAL,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland, 21202.

I HEREBY CERTIFY that on this day of June, 1973, a copy of the foregoing Answer of Sgt. V. D. Smith, was mailed, postage prepaid, to Charles F. Morgan, Esq., 341 North Calvert Street, Baltimore, Maryland 21202, Attorney for Plaintiff.

GILBERT ROSENTHAL,
Assistant Attorney General.

In the United States District Court
For the District of Maryland

Civil Action No. 72-68-N

Civil Action No. 72-234-N

Milton McCray

v.

Robert Burrell

Milton McCray

v.

Sergeant V. D. Smith
[Sergeant Bernard D. Smith]
(Badge No. 153)

ORDER TO AMEND OPINION OF THIS COURT DATED OCTOBER 16, 1973 AND DIRECTING CLERK TO ENTER JUDGMENT

IT IS, this 2nd day of November, 1973, ORDERED that the Opinion of this Court filed in the captioned cases on October 16, 1973, BE and the same HEREBY is amended and changed in the following manner:

Page 61 — seventeenth (17th) line from top of page. The word "DENIED" shall be stricken and the word "GRANTED" shall be substituted in lieu thereof, so that the sentence will read:

"1. That the defendants' Motions to Dismiss in Civil Actions Nos. 72-68-N and 72-234-N be, and the same hereby are, GRANTED."

AND IT IS FURTHER ORDERED that the Clerk of this Court shall enter judgment accordingly.

EDWARD S. NORTHROP
Edward S. Northrop,
Chief United States
District Judge.

In the United States District Court
For the District of Maryland

Civil Action No. 72-68-N

Milton McCray
v.
Robert Burrell

JUDGMENT

In accordance with the Opinion of the Court dated October 16, 1973, filed in the above case, and Amended by Order of the Court dated November 2, 1973, it is

ORDERED AND ADJUDGED:

1. That the Defendant's Motion to Dismiss be, and the same hereby is, GRANTED;

2. That the Plaintiff's claim for relief be, and the same is, DENIED.

Dated at Baltimore, Maryland this 5th day of November 1973.

PAUL R. SCHLITZ,
Clerk.
By: EARL L. GRAHAM,
Deputy Clerk.

In the United States District Court
For the District of Maryland

Civil Action No. 72-234-N

Milton McCray

v.

Sergeant V. D. Smith
(Sergeant Bernard D. Smith)
(Badge No. 153)

JUDGMENT

In accordance with the Opinion of the Court dated October 16, 1973, filed in the above case, and Amended by Order of the Court dated November 2, 1973, it is ORDERED AND ADJUDGED:

1. That the Defendant's Motion to Dismiss be, and the same hereby is, GRANTED;

2. That the Plaintiff's claim for relief be, and the same hereby is, DENIED.

Dated at Baltimore, Maryland this 5th day of November 1973.

PAUL R. SCHLITZ,
Clerk

By: EARL L. GRAHAM,
Deputy Clerk.

United States District Court for the District of Maryland

Stokes v. McClellan — 73-1182-B

DOCKET ENTRIES

1973

December 4—(1) Complaint, Affidavit, and Exhibits A through G.

December 4—(2) Order of Court (Blair, J.) granting leave to file in forma pauperis and directing issuance of summons by U.S. Marshal with copy of complaint on the Attorney General of Maryland and on the defendants named in the complaint.

December 5—(3) Summons issued. (All served)

December 17—(4) Supplement of petitioner to Prayer for Relief and attachment.

December 21—(5) Motion of defendant for enlargement of time and order (Blair, J.) Dated December 27, 1973 that the time for filing responsive pleadings, etc. is hereby extended to and including January 10, 1974. (Cys. mailed)

1974

January 11—(6) Motion of defendant to dismiss or in the alternative motion for summary judgment and memorandum in support thereof. (Cys. submitted)

March 1—(7) Memorandum (Blair, J.). (Cys. mailed as directed)

March 1—(8) Order (Blair, J.) dismissing complaint without prejudice to its reinstitution upon exhaustion of remedies available through the Maryland Inmate Grievance Commission as therein more particularly set forth. (Cys. mailed as directed) Closed

March 15—(9) Notice of Appeal of Petitioner. (copies mailed by Clerk — 4-16-74).

In the United States District Court
for the District of Maryland

Civil No. ___
(To be supplied by Clerk of Court)

James E. X. Stokes,
Plaintiff,
v.
Gerald McClellan, individually and in his official capacity as Warden of Maryland Penitentiary, and the Mail Censor, individually and in his or her official capacity as Mail Censor of the Maryland Department of Corrections,
Defendants.

SUIT FOR PRELIMINARY AND PERMANTENT INJUNCTIVE RELIEF

(Filed December 4, 1973)

Demand for Jury Trial

1. JURISDICTION

1. This is a civil action authorized by 42 U.S.C. Sec. 1983 to redress the deprivation, under color of State law, of rights secured by the Constitution of the United States. The Court has jurisdiction under 28 U.S.C. Sec. 1343. Plaintiff seek declaratory relief pursuant to 28 U.S.C. Secs. 2201 and 2202.

II. PLAINTIFF

2. Plaintiff James E. X. Stokes was (is), at all times mentioned herein, a prisoner of the State of Maryland, in the custody of the Maryland Department of Corrections. He is currently confined at the Maryland Penitentiary, 954 Forrest Street, Baltimore, Maryland 21202.

III. DEFENDANTS

3. Defendant Gerald McClellan is the Warden of Maryland Penitentiary. He is legally responsible for the operation of Maryland Penitentiary and for the welfare of all the inmates of that prison.

4. The Mail Censor inspects in-coming as well as out-going mail, newspapers, etc. and he or she is legally responsible for seeing to it that newspapers are forward to all inmates of that prison. Maryland Penitentiary.

5. At all times hereinafter mentioned, defendants seperately and in concert, acted under color and pretense of law, to wit, under color of statutes, regulations, customs and usages of the State of Maryland. Each of the defendants herein, separately and in concert, engaged in the illegal acts hereinafter mentioned to the injury of Plaintiff and deprived plaintiff of his rights, privileges and immunities secured to him by the First and Fourteenth Amendments as well as the Fourth as it relates to the Ninth Amendment to the Constitution of the United States.

IV. STATEMENT OF CASE — FACTS

6. Prison officials (Wardens) have always found something up-setting about what Black prisoners read. Especially white racist-minded type officials.

7. In the past, prison administrations even sought to justify excluding Muhammad Speaker because, inter alia, its format in many respects is anti-government and racist", and would interfere with rehabilitation.

8. It is such racism and racial discrimination as the aforementioned that explains this instant case — cause of action.

9. Plaintiff has been receiving both the Gay Liberator newspaper and Akwesasne Notes (a Native American newspaper) because he was (is) interested in both the educational and political point of view and.

10. Up to July 1973, the Warden and his agent (Mail Censor) began returning the papers to the senders marked "disapproved."

11. Both Defendants did and still is engaging in a concerted on-going act of psychological warfare which, has and still is causing Plaintiff much mental anguish and emotional suffering.

12. If Plaintiff can have pictures such as Exhibits A, B, C and D, than surely he can have in his personal and private possession educational and political literature to read.

13. Attached hereto is a copy of Exhibits E, F and G of Plaintiff's attempt to find-out why the Mail Censor would not and will not deliver the said papers to him and, inform the Warden of the Mail Censor actions.

14. Since the Warden was informed of this problem and, by his refusal to order his agent (Mail Censor) to cease and desist from such un-constitutional practices or policies he became an accessory after the fact and, or the Mail Censor informed him of his or her actions wherefore,

15. The Warden was accessory before and after the fact.

V. Legal Claims

16. Plaintiff has and is being deprived of his right to possess and read educational/political literature, which is guaranteed by the First Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment. The confiscation/returning of the papers also deprived Plaintiff of his property without the due process of law required by the Fourteenth Amendment.

17. Plaintiff right to privacy is being violated by defendants interfering with not only with his educational/political thoughts but his right to choose and free will to possess and read such relevant literature in the confines of his cell as is guaranteed by the Fourth Amendment as it relates to the Ninth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment.

18. Plaintiff have no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff have been and will continue to be irreparably injured by the conduct of the defendants unless this court grants the declaratory and injunctive relief which plaintiff seek.

Wherefore, plaintiff respectfully pray that this Court enter judgment granting plaintiff:

1. A declaratory judgment that the defendants acts, policies and practices described herein violate's not only plaintiff rights under the United States Constitution but is also racist, and racial discriminatory to Native Americans and, prejudiced to Gays as a class.

2. A preliminary and permanent injunctive which

a. Requires defendants McClellan and Mail Censor to cease and desist from confiscating and returning "Gay and Native American" literature in the future.

b. Requires defendant McClellan to rescind the policy directive concerning confiscation of and returning Gay and Native American literature and to issue regulations which prohibit any such confiscation and the returning of such literature in the future.

c. Prohibits defendants, their agents, employees, successors in interest and all other persons in active concert or participation with them, from further racial and/or class discrimination against Gays and Native American people by their refusal to deliver the "Akwesain Notes and Gay Liberator newspaper to plaintiff which is discriminatory to plaintiff as well, since such practices or policies interferes with his right to education and political belief, during the pendency of this action.

d. Requires defendant McClellan to allow plaintiff and other prisoners to: 1) engage in any oral or written communication which is reasonably related to the conduct of this suit, including the preparation of affidavits on behalf of other prisoners; and 2) to confer with other prisoners and prepare legal papers, and to do anything else, consistent with prison security, which is reasonably connected with the conduct of this suit.

3. Compensatory damages in the amount of $10,000 to plaintiff from both defendants and each of them.

4. Punitive damages of $10,000 to plaintiff from Defendant McClellan and from Defendant the Mail Censor.

5. Trial by jury on all issues triable by jury.

6. Such other and further relief as this court may deem just, proper and equitable.

A motion to proceed in Forma Pauperis is attach hereto, along with plaintiff's brief, and motion for appointment of counsel.

Dated: Sept. 6, 1973

Constitutionally submitted,

JAMES E. X. STOKES, PROSE
James E. X. Stokes,
Maryland Penitentiary,
954 Forrest St.,
Baltimore, Md. 21202,
In Propia Personam.

In the United States District Court
For The District of Maryland

James E. X. Stokes,
Plaintiff,

v.

Gerald McClellan, individually and in his official capacity as Warden of Maryland Penitentiary, and the Mail Censor, individually and in his or her official capacity as Mail Censor of the Maryland Department of Corrections,
Defendants.

Civil No. ____

BRIEF

Since the defendants never supplied plaintiff with a reason for their "all of a sudden" total disapproval of Akwesasne Notes and Gay Liberator plaintiff can only conclude that the refusal to deliver Akwesasne Notes was (is) based on "racial and class discrimination" which, has and is being directed against all people of color, Red in reference to Native Americans and, the refusal to deliver Gay Liberator is based "solely" on class prejudice of people who do not suffer" racial or class hang-ups as the defendants. Wherefore, the defendant seeks to ban the said newspapers for the reasons stated herein and, including the fact that plaintiff is a Black person. Defendant McClellan like all white racist prison officials believes it is a crime for Black prisoners to read any literature that is not all-Amerikkkan and anti-people. Furthermore, the defendants seem to be saying: that they, agents of the State, supersede the federal government, nullifying the Constitution of the United States. Otherwise, the

defendants would not arbitrarily censor, regulate and abuse plaintiff rights which, are guaranteed by the First Amendment. Wm. Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D. N.Y. 11-24-70) the Court noted the absence of a compelling state interest centering about prison security or discipline, to justify the serious and irreparable injury to a "preferred" freedom under the First Amendment. Censorship is utterly foreign to our way of life, it smacks of dictatorship. Correctional and prison authorities, no less than the courts, are not above criticism, and certainly possess no power of censorship simply because they have the power of prison discipline, in granting the preliminary injunction.

JAMES E. X. STOKES,
James E. X. Stokes,
Maryland Penitentiary,
954 Forrest Street,
Baltimore, Md. 21202,
In Propais Personam.

In The United States District Court
For The District Court of Maryland

James E. X. Stokes,
Plaintiff,
v.
Gerald McClellan, et al.,
Defendants.

---

*Civil No.*____

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon the complaint, the supporting affidavit of plaintiff, and brief submitted herewith, plaintiff move this court to order Gerald McClellan and the Mail Censor to show cause why a preliminary injunctive should not be issue pursuant to Rule 65(a) of the Federal Rules of Civil Procedure enjoining the defendants, their successors in office, agents and employees and all other persons acting in concert and participation with them, from interfering with, and returning the Gay Liberator and Akwesasne Notes newspapers to senders marked "disapprove".

JAMES E. X. STOKES, PRO
James E. X. Stokes,
Maryland Penitentiary,
954 Forrest St.,
Baltimore, Md. 21202.

July 30, 1973

Dear Miss, Mrs, Ms or Sir,

I have received letters informing me that you are returning the Akwesasne Notes and Gay Liberator newspapers marked "not approved".

In the future you will please cease and desist from such acts.

JAMES E. X. STOKES
Cell #130
South Wing.

August 15, 1973

Re: Letter dated July 30, 1973

Once against I have received words concerning returning reading matter wherefore you will now give me notification. I have a chance to reply in writing or orally before you return any Gay Liberator and/or Akwesasne Notes in the future.

JAMES E. X. STOKES

August 15, 1973

Mr. McClellan,

I have written the Mail Censor concerning Gay Liberator and Akwesasne Notes newspaper. As of yet, I have received no answer. Therefore, I can only assume that you have sanction his or her acts. If I do not receive words from you by 29 August 1973, as to any I no longer can receive the said newspapers mentioned herein. I will take court action.

JAMES E. X. STOKES
South Wing

Note: Letter to Mail Censor July 30 and one (1) this morning.

In The United States District Court
For The District of Maryland

Civil No. 73-1182

James E. X. Stokes,
Plaintiff,
v.
Gerald McClellan, Warden, et al.,
Defendants.

Filed December 17, 1973

SUPPLEMENT TO PRAYER FOR RELIEF

In supplement to the above cause, petitioner prays that this court will impose First Amendment procedural standards on the defendants as follows:

1. Notice and reason (s) in the future for refusal to deliver the said papers or correspondence;

2. Some opportunity for the plaintiff to object (either personally or in writing;)

3. A decision by a body that can be expected to act fairly and,

4. That the screening process be exercised within a set reasonable period of time.

Dated: December 10, 1973

Constitutionally submitted,

JAMES E. X. Stokes
James E. X. Stokes
954 Forrest Street
Maryland Pemitentiary
Baltimore, Maryland 21202

December 10, 1973
954 Forrest St.

Dear Clerk,

Please inform Judge Blair that unless First Amendment procedural safeguards are impose upon the defendants they will only continue to arbitrary deny any and all reading matters without affording any due process what so-ever. Example: on or about the 5th or 6 December I received a memo from a Mr. Folse. Classification counselor here at the Pen. Informing me that Worker World, another newspaper had been disapproved because of so-called security. And, even though I have tried to get appointment with Mr. Fine, Asst. Warden of Treatment as well as written to The Warden I have yet to this writing heard anything concerning my request to Mr. Fine and Warden McClellen that in the future they afford me at least minimum due process before they disregard my first amendments rights.

JAMES E. X. STOKES

PROCEEDINGS OF JUNE 12, 1973

(171) (The Clerk) Civil Action 72-234-N, Milton McCray versus Sergeant V. D. Smith, Maryland Penitentiary.

(The Court) All right.

(Mr. Morgan) Your Honor, if I may, just briefly, state what this case is about.

What we are alleging in this case, Your Honor, is that at a period of time when Mr. McCray was in the south wing segregation section in the Penitentiary, he was removed from his segregation cell and placed into an isolated confinement area by the Defendant, Sgt. Smith, where he remained for at least two days. He was then placed back into the regular segregation section of the Penitentiary.

We are claiming damages as relief, and our claim is based on two legal theories. First, we're saying that the conditions under which Mr. McCray was confined in that two-day period violated his right to be free from cruel and unusual punishment under the Eighth Amendment.

Also in that connection, we are alleging that the confinement, conditions of the confinement during that two-day period subjected Mr. McCrary to unwarranted and unneces- (172) sarily degrading and undignified treatment, violating his right to privacy.

The second basis of the claim is a Fourteenth Amendment claim, and that is that the punishment imposed upon Mr. McCray, the punishment being the placement in the isolated confinement cell for two days, was summarily imposed by the Defendant without any semblance of procedural due process either before, during or after the punishment, with no justification for that summary punishment.

Mr. McCray suffered injuries as a result of his confinement in isolated — as a result of his confinement in isolation, and the relief he requests are compensatory damages, to compensate for violation of his constitutional rights, nominal damages, and puni-

tive damages against the Defendant, punitive damages because the Defendant was acting under rules and regulations which he should have known, rules and regulation which set forth constitutional standards and which he consciously violated.

(The Court) All right.

(The Clerk) Mr. McCray, you are still under oath for the purposes of this action, also, 72-234.

By Mr. Morgan:

Q. Mr. McCray, just state where you are presently confined. A. Maryland Penitentiary.

(173) Q. Maryland Penitentiary? A. Yes.

Q. Could you tell the Court how old you are, please? A. 33.

Q. Are you from Baltimore? A. Yes, I am.

Q. Born in Baltimore? A. Yes.

(The Court) Now, answer so that the Reporter can get it down.

(The Witness) Yes, to all the questions that he asked.

By Mr. Morgan:

Q. Mr. McCray, when did you begin service of the sentence that you are presently doing? A. February 4th, 1969.

(The Court) February 4, what?

(The Witness) 1969.

(The Court) 1969?

(The Clerk) 1969.

(The Court) All right.

By Mr. Morgan:

Q. And what is the sentence you're serving, Mr. McCray? A. 28 years.

(174) (The Court) 28, what?

(The Witness) Years.

By Mr. Morgan:

Q. For what offense, Mr. McCray? A. Deadly weapon, assault with intent to murder; deadly weapon, assault with intent to murder, and—

(The Court) Now, speak up.

Fix it up so he can speak into it.

(The Witness) I like to talk to the Judge.

(The Court) Just look straight ahead, or look at counsel, that's all right, just make sure you talk into that thing, right?

(The Witness) I like to talk to the man that has the power to—

(The Court) Yes, I notice you do that, but that's perfectly all right, I can hear you, that's okay now, if you want to talk over here, that's fine.

Now, put that microphone up near you and speak up.

By Mr. Morgan:

Q. Mr. McCray, before the time you entered prison on this sentence, February 4th, 1969, had you been employed? A. Repeat that.

Q. Had you been employed prior to the time that you entered prison on this sentence? (175) A. Yes, I owned my own grocery store.

Q. Where was that located? A. Barclay Street.

Q. What was the name of the store? A. Sander's Grocery.

Q. Mr. McCray, in a case of this kind, it's proper for the State, or the Defendant, to cross-examine you on the question of your past criminal record.

We have agreed, your counsel and the State has agreed during the recess to try to work out what that past criminal record is, and we'll stipulate to it, so I won't ask any questions about it and the State won't ask any questions about it, but we will agree to that.

(The Court) All right?

(The Witness) Yes, sir.

I'm not proud of my criminal record.

(The Court) What?

(The Witness) I'm not proud of my criminal record, but it's mine.

By Mr. Morgan:

Q. Mr. McCray, I direct your attention to November 20th, 1971, were you in the Penitentiary at that time? A. Yes.

Q. What part of the Penitentiary were you in? A. South wing.

(176) Q. Could you describe to the Court what the south wing is? A. South wing is the area of the Penitentiary where they house inmates that are in violation of the Penitentiary rules.

Q. Could you describe that section briefly? A. Well, it's a desolate place, I that just about — it's cold, it's lonely, and it's cruel.

(Mr. Rosenthal) I object to that, Your Honor.

(The Court) Well—

(Mr. Rosenthal) I think that's a conclusion.

(The Court) Yes, okay.

(The Witness) That's a fact.

(The Court) Objection overruled.

Go on.

By Mr. Morgan:

Q. Mr. McCray, could you describe the south wing physically, for example, how the tiers are laid out, how the cells are laid out? A. Well, it's — it has five tiers, the doors are key operated with a lever back in the tier, this is old fashioned, is an antique system there. It's filthy. That's just about it. It's cold, filthy and just operated by an old lock system.

Q. Mr. McCray, on November 20th, what part of the south (177) wing were you housed in? A. On what day?

Q. On November 20th, 1971? A. In the hole area. That—

Q. Prior to being housed in the hole area, where were you housed? A. On the second tier, I think it was, on street side in the south wing.

Q. The second tier means two floors off the ground? A. Two floors off the ground, yes. I'm not sure, I know it was in that south wing area, either the second or fourth, I've been over there quite a few times.

Q. Mr. McCray, you are aware of the complaint that you made in this case and I think to save time if it's agreeable with the State, rather than my asking you directly, direct questions about it, could you describe what happened to you on November 20th while you were in that tier, the nature of your complaint in this case? A. Do you want me to describe what led up to this case?

Q. Yes. A. Well, when I was put in south wing that time, they put me in the cell on the second tier, and the cell they put me in, I mean, was filthy. Trash, dirt, torn mattresses, parts of mattresses on the floor. It just hadn't been cleaned.

(178) I immediately called the officer and explained to him that I should be moved to another cell, and the officer looked in the cell and he saw that the cell was in bad condition, so he called the tier runner and asked the tier runner, why didn't you clean the cell, why is this cell like it is, and the tier runner at that time—

(The Court) Who?

(The Witness) The tier runner at that time told him that no one supposed to be in the cell because the cell had lice in it, because someone in the cell had lice, and when I heard this, I really performed.

So, they finally took me out of the hole — I mean, out of the cell and placed me in the hole area, isolated area.

(The Court) What?

(The Witness) This the hole area, this is an isolated area where there is six cells and no bed, a toilet and a

sink, this is another part of the south wing, this is the area that they place you in if you violate a rule on south wing.

I immediately asked for a shower as a result of being in the cell with lice in it.

(Mr. Morgan) Excuse me.

By Mr. Morgan:

Q. Mr. McCray, if I may interrupt, could you place this in time, was this on the 20th, or was this before the 20th, (179) or— A. This was before the 20th, this, I think, led up to me being on the south wing.

Q. I see.

All right.

A. The Warden came through and I called him and I explained to him that I was in south wing, in the hole, because they had just taken me out of the cell that had lice in it and no one would give me a shower as a result of it.

He had to call the officer and asked about it, and they verified my statement. So, in turn, he ordered Sgt. Smith here to give me a shower and to see that I get my law books and take me out of the hole.

Sgt. Smith told him, he was quite angry at me for, I guess, approaching the Warden, and he told the Warden to his face that he wasn't going to do anything for me.

Well, anyway, another officer, I don't know whether Sgt. Smith ordered him to do it, or not, got me. I don't know whether Sgt. Smith ordered him to give me a shower and spray some delicer, or whatever it was, powder on me, or not, but an officer came in and he took me down, gave me a shower, and sprayed me with powder.

They then placed me on fourth tier, I think it was third or fourth tier, in another cell, and I stayed there, I think, for a day or so, but immediately after I was put in the (180) cell I asked Sgt. Smith to give me the law books that the Warden had ordered me to have. He wouldn't give them to me. I asked a couple other officers

that came by that — I informed them that the Warden had ordered me to get my law books and Sgt. Smith wouldn't give them to me and would they check and see whether they could get them for me.

Well, I didn't get them.

So, on the — I think it was on the 19th, or 20th, I decided that I had a right to demand my law books since the Warden had — I had gotten the okay from the Warden to have them. So, I started hollering and calling an officer to give me my law books, and the shower, the Warden also ordered this for me, and Sgt. Smith came around and he told me that if I didn't shut up, what he was going to do, you know, and I kept calling. I told him I only wanted what was — what I was entitled to.

Q. If I might interrupt, Mr. McCray, what were the things that you were asking Sgt. Smith for at that point? A. My shower, daily showers, because of the prescription that was given to me by Dr. Gould at Maryland Penitentiary, that I should have a medicated shower every day, and I felt that I had a right to have that also because the doctor ordered it, and Sgt. Smith, he came to my door about 10 minutes later and asked me what was the problem, you know. I told him I wanted the law books, I said, Man, you was there (181) when the Warden told you to get me the law books and he told you to give me a shower, and he told me something about the shower was being deliced, and as far as the law books goes he just didn't have time then and when he get time he will bring them to me, you know, and one word led to another, and, finally, he opened the door and said, all right, him and another officer, let's go down to the hole.

I told him. look, Man, I said, I'm not going nowhere, I haven't done anything. So, I sit down on the floor. So, he told the officer, let's take him out. So, each one of them grabbed me by the arms and dragged me out to the end of the tier, and Sgt. Smith dragged me down the steps, but the other officer, I don't know if he felt sorry for me, or not, he said, no, don't drag him down, he said, I'll pick him up.

So, the officer picked me up by the shoulder and led me down in the hole area.

While down there, when I got in the hole area, he told me to take my clothes off, so I was taking off my clothes and I wasn't taking them off fast enough, Sgt. Smith reached up, he said, hurry up, I don't have all day to wait for you to take your clothes off, and he tore off my jump suit and shoved me in the hole area.

Just as he was getting ready to go out the door, I said, Man, what about my shower. He said, what about it? (182) I said, Man, aren't you going to give me my shower, I got a prescription for it, I said, I been getting this shower every day in another institution prior to coming here and I've been taking it every day outside, I need it in order for me to sleep comfortable. He says, you want a shower? I said, yes. So, he went around one of the cells, back in the corner there, and I was standing at the door, I never thought he was going to throw any water, I thought he was going back to get a key, I didn't know what he was going to do.

Anyway, I was standing at the door and he come around the bend and before I could get myself together he dashed me with this bucket of water, and he said, now, you got your shower, and he walked on out.

Well, I said a few words behind that, and it was cold there that particular day, and—

Q. Mr. McCray, if I might interrupt you at this point to ask you a couple of specific questions. A. Yes.

Q. About what you've said so far. A. This has been so far away, I can't remember, I've got it pretty well.

Q. All right, sir.

Mr. McCray, you say you had been calling for law books, why did you need the law books? A. Well, I have quite a few cases in different courts (183) all over the state and if I don't file answers, letters, or, well, I just have the time for the letter to go out, or I'll forget them, or my work will get behind, and I was particularly interested in having my law books at that time because of that reason.

Q. What law books did you own at that time? A. I owned quite a few law books, boxes, I had about two or three boxes of law books. I'm sure Sgt. Smith can verify that.

Q. What was the nature of the prescription you said you had gotten from Dr. Gould concerning a shower? A. Well, it was — I was supposed to get a shower every day and I have to have an oil to my body, and I think — a cream, I have a nervous condition and keep down the itch, and this had been going on, oh, about two years, and Dr. Gould has been constantly keeping me on this because it's the only thing that helped me, the showers and the alpha keri oil and the cream, this was the only thing he could prescribe that would help the condition.

Q. Now, before you were taken to the hole, Mr. McCray, isolated confinement, you say Sgt. Smith came to your cell? A. Yes, he did.

Q. And you requested these two items from him, law books and showers? A. That's correct. I said, all I want is my law books (184) and my daily shower.

Q. And what did Sgt. Smith say, if anything, to you? A. He told me that he wasn't going to give me the law books and I reminded him of the Warden's order, and he told me that he didn't care, he just wasn't going to give them to me.

Q. Now, at this time, Mr. McCray, I believe you testified you were on the third or fourth tier, which side of the institution was that on? A. On the yard side.

Q. It was on the yard side? A. Yes, on the yard side.

Q. Could it possibly have been on the street side? A. No, it wasn't, it definitely wasn't the street side, I remember it was on the yard side, I was on the street side before they put me in the hole.

Q. I see.

Do you recall how many other men were on that same row of cells with you? A. I didn't stay up there, like I say, a few hours, I guess, it wasn't long enough for me to know who was on the tier.

You see, once you're locked in your cell, you don't know who's next door to you unless you get a chance to talk through the wall.

(185) Q. I see.

At the time that you were yelling out the door of your cell, I believe you did testify you were yelling for these things? A. Yes.

Q. Was there anyone else in south wing yelling out the doors of their cells? A. Oh, no, no, there wasn't anybody else yelling, I was just calling Sgt. Smith, you know, constantly calling, and that was it.

Q. To your knowledge, Mr. McCray, were any inmates out on your tier at that time, out of their cells? A. No, no one, they're not permitted out of their cells.

Q. Now, you testified that Sgt. Smith, with other officers, took you down from the third or fourth tier to the— A. Yes.

Q. —flats, as it's referred to, the bottom floor of the south wing, is that correct? A. Right.

Q. And they took you into what is known as the isolated confinement area? A. Yes.

Q. You referred to it as the hole? (186) A. Yes.

Q. Could you describe that area physically, for example, if there are cells there, how many, what the cells look like, what the area in general appears? A. Well, it has two entrances. One from the Captain's office at the time, the other one from south wing area. There's no windows in the hole area. They have six cells. In each cell there's a toilet and sink combination — I think it is — yes, they have a light in the back of the cell, that is never turned on, the only way it can be turned on, the officer has to go all the way around behind the cells and turn it on. Sometimes they turn it on during the day, and at night. It has a cement block on the floor for a bed.

(The Court) Cement, what?

(The Witness) Cement block, about this long, about — it's about eight inches long.

By Mr. Morgan:

Q. Mr. McCray, do you recall which of the six cells you were placed in? A. What?

Q. Do you recall which of the six cells you were placed in? A. Number five.

Q. All right. (187) Now, how large was that cell, if you would estimate? A. It's about as big as that table that's in back of the chair, I think, from the beginning of this table to the back of your chair.

Q. About that wide? A. Yes, about that wide.

Q. Approximately four to five feet? A. Approximately that.

Q. And about how long would you say? A. Maybe 12, 15, 16 feet, I guess, I don't know.

Q. It's a long, narrow cell? A. It's long and narrow, yes.

Q. It's more long and narrow than it is square? A. Much more long and narrow than it's square.

Q. All right.

Now, you testified that in these cells, and I direct your attention just to the cell you were in, there's a toilet and a sink, is that right? A. Yes.

Q. Were those things in your cell? A. There was a toilet and a sink in the cell I had.

Q. How high is the cell, by the way? A. It's quite high, I would say about 18 feet. It's quite high.

Q. It's more than three times as tall as you are? (188) A. I would say two times, about twice as tall as I am.

Q. What is the construction of the walls in the cell? A. Cement.

Q. Cement? A. Yes.

Q. Are they painted? A. Yes.

Q. I'm directing your attention now to the time when you were there, they were cement then and they— A. A brownish orange color, I think, orange or yellow.

Q. Now, if you would, would you describe again this cement block that was in the cell? A. Well, it's just a big cement slab in the floor, up against the wall, about nine feet long and about three or four feet wide, I guess it is.

Q. And how deep is it? A. About six — about 12 inches.

Q. All right.

(The Court) About twelve inches?

(The Witness) Yes, high.

By Mr. Morgan:

Q. And that's made out of cement? A. Yes.

Q. Now, is there a light in your cell? (189) A. There's a light in the back of the cell, turned on late in the evening, it's not during the day.

Q. Does the cell have doors? A. It has two doors.

Q. Would you describe those two doors? A. One is barred, the other one is a wooden door.

Q. A solid wooden door? A. A solid wooden door.

Q. Which door is inside and which door is outside? A. The barred door is inside, the wooden door is outside.

Q. All right.

Now, when you were placed in your cell, were either or both of those doors closed? A. At times. Whenever an inmate is brought into the south wing area, they always close the wooden door. Other than that, they will leave it open, unless they want to — an officer just wants to be nasty, or he just don't like you, he will lock that door.

Q. On this particular occasion, did — was the outer door, the solid door, closed on you, or not? A. After he throwed the water on me, he slammed the door just before he walked away.

Q. The solid wooden door? A. Yes, but he didn't lock it, I shoved it back open.

(190) Q. How long was the solid door closed, altogether? A. Well, just throwed the water and when I jumped back from the water, the door was closed, you know, and I come back up to the door and pushed it back open at that time.

Q. All right.

Now, when you entered the cell, you testified that there's a concrete slab on the floor and there's a toilet, sink and a light, was there anything else in the cell? A. Nothing else.

There was a mattress in there when I first came in the hole, they took that out.

Q. Who took it out? A. Sgt. Smith. I don't know if it was exactly him, him or one of the other officers took it out.

Q. At the time you were put in the cell? A. Yes.

Q. You testified you were put in the cell without any clothes on, is that correct? A. No clothes at all.

Q. Mr. McCray, do you recall how long you were in this cell? A. About two days.

Q. At any time during the two-day period did you have clothes to wear? A. No. I got my clothes the day they took me out.

(191) Q. Just before you were taken out? A. Just before I was taken out of the room.

Q. At any time during the period of time when you were in isolated confinement, did you have a mattress? A. Oh, I received a mattress that night, I think it was the officer that came on the next shift, gave me a mattress. He didn't want to give me that until — he didn't give me that until late that night, I think it was, I'm not sure how I got that mattress. I know I got a mattress eventually after complaining quite a bit, and that was the only other item in the cell, other than what I described.

Q. Did you have a mattress for the first night you were there? A. Yes.

Q. Is the isolated confinement area an area where there is — during the period of time when you were in isolated confinement, I assume you could see out of the front of your cell door, is that right? A. Yes.

Q. Did you see any other people during that two-day period in the isolated confinement area, either inmates or guards? A. Oh, constant through there. I mean, every inmate that goes in, is admitted to the south wing area, comes through, and they're shook down, their clothes are taken (192) off and they're assigned to a cell in the south wing, in that area.

Q. During that two-day period, did you witness inmates walking by your cell? A. Yes.

Q. Did you witness Correctional Officers walking by your cell? A. Constantly. That's an avenue for going to the Captain's office, was an avenue for — to the Captain's office at that time.

Q. At any time during that two-day period, Mr. McCray, did you request that you be given clothes to wear? A. Yes, I did. The whole time I was there, every hour, every available opportunity, you know, I would ask for clothes.

Q. Were clothes ever provided? A. Not until I was released.

Q. Do you recall any specific cases when you asked for clothes, or any specific officers or inmates from whom you asked for clothes? A. No. I asked just about every officer that came through there that I thought might be able to ask someone or convince Sgt. Smith, or whatever officer was out at the desk, to give me something to put on.

Q. During the time you were in this cell, Mr. McCray, (193) were you taken out for any purpose? A. No.

Q. During that two-day period, you remained in the cell for the total two days? A. Yes.

Q. Then I assume you did not have a shower during that period of time? A. No, I didn t.

(Mr. Rosenthal) Your Honor please, I have not objected—

(The Court) Yes, you are leading, Counsellor.

(Mr. Rosenthal) Leading terribly.

By Mr. Morgan:

Q. Mr. McCray, during that period of time when you were in the hole, did you have any visits? A. No, no visits.

Q. Did you have with you in your cell during that two-day period any personal belongings? A. None at all.

Q. Did you have any items of personal hygiene? A. None at all.

Q. Did you have a toothbrush? A. No.

Q. Toothpaste? A. No.

(194) Q. Did you have a wash cloth? A. No.

Q. Towel? A. No.

Q. Were you fed during that period of two days, Mr. McCray? A. Yes, I was fed.

Q. Could you describe the manner in which you were fed? A. Well, they brought it down in — they had containers that they put food in, plastic cups. They take all the food, put it in separate plastic cups, you know, that they have, corn flakes, they give you the cereal, they have milk, they give you a milk carton, if they have juice they put it in a plastic cup, if they have soup they put that in a plastic cup, if they have meat they have to put that in a cellophane bag, bread, they hand that to you, you know, the inmate hands that to you, it would be on a tray, he'll hand it to you, you take it off the tray if you want to, this is an inmate brings it to you.

Q. Mr. McCray, the first night you were in the hole, did you sleep on the mattress? A. The first night?

(The Court) You've already asked him that, and he said yes. You're leading him constantly.

(195) (Mr. Morgan) I'm sorry, Your Honor.

(The Court) He said he got the mattress late at night.

By Mr. Morgan:

Q. Mr. McCray, could you describe — well, first of all, Mr. McCray, would you characterize the condition of the cell as either clean or dirty, and if you can characterize it as one or the other, could you explain why you would characterize it in that way?

(Mr. Rosenthal) Your Honor please, I object.

(The Court) Objection sustained.

By Mr. Morgan:

Q. Mr. McCray, do you know an Officer Greenwood? A. Yes, I do.

Q. During the period of time that you were in isolation, did you have an opportunity to talk to Officer Greenwood? A. Yes. He was the Acting Officer, head officer on night shift on the 20th, he was the officer that woke me up for sleeping inside the mattress that particular night.

Yes, I remember him.

Q. You state you were sleeping inside the mattress? A. Yes.

Q. What was the purpose of your sleeping inside the mattress? A. Well, I had no clothes on, it was cold, I laid on (196) the mattress as long as I could, and I've got a complex laying out on mattresses nude, anyway, down there, and it got so cold in that hole until I had no choice but to resort to the only method of getting warm that I possibly could, since all my requests for clothes were denied.

I tore the mattress open, it was a rotten mattress anyway, and I stuck my finger in one of the big holes it had, dug a channel down in between the cotton, and I went to sleep.

As a result of that, Officer Greenwood came and he didn't say anything to me, but he came, opened the door and saw me in there, and the next day I got a ticket for destroying a mattress.

Q. Did you have an adjustment team hearing? A. Yes.

Q. As a result of that? A. Yes.

Q. Were you found guilty or not guilty?

(Mr. Rosenthal) I object, Your Honor, I don't know if there's any relevancy.

(The Court) Yes.

Objection sustained.

By Mr. Morgan:

Q. Mr. McCray, during the period of time that you were in the cell for two days, what did you do to occupy yourself, (197) how did you spend your time?

(Mr. Rosenthal) Again, Your Honor, I'm not sure of the relevancy, and we would voice an objection.

(Mr. Morgan) Your Honor, the relevancy of this question is, we're suggesting and we're alleging that the conditions of this type, segregated confinement, is in violation of the Eighth Amendment, the Eighth Amendment deals with physical inflictions of punishment as well as mental inflictions of punishment and I think we can show—

(The Court) All right, I'll permit the question. Go on.

Objection overruled.

By Mr. Morgan:

Q. Mr. McCray, during that period of time, how did you occupy yourself, how did you spend your time in the cell? A. Well, walking the floor, try to keep my mind off being in the hole, that's one important thing I tried to do, I might try to do some exercises, think about the past, think about my case, but if an officer come through, might try to strike up a conversation, if he would stand still long enough, or an inmate come through, try to talk to him, just try to keep my mind off the conditions that I was under, you know.

Q. Did you have any reading material? (198) A. Well, this particular time, I didn't try to talk to

anybody because I was in the nude and I didn't particularly want to be standing talking to anybody, but that's the usual thing I do when I'm in the hole.

Q. Did you have any reading materials with you? A. Oh, no, none at all, didn't allow it.

(Mr. Morgan) I don't have any other questions.

Thank you, Mr. McCray.

CROSS EXAMINATION

By Mr. Rosenthal:

Q. Now, Mr. McCray, at the time you were on the street side, which tier were you on, if you recall? A. The second tier.

Q. The second tier.

And you do acknowledge the fact that you were hollering, is that correct? A. Yes. Not — on the street side?

Q. Yes, sir.

When you first started hollering for your books and— A. No; on the street side, I was hollering to get out of the cell with the lice in it.

Q. All right. A. At that time, to tell the officer, that was the cell with lice in it, is when I started.

(199) Q. And how long did this hollering go on? A. It didn't go on but a few minutes, the officer came right back to the door and said, we're going to get you out.

Q. Then you were taken, as I understand it, to the fourth tier, yard side? A. I was taken in the hole.

Q. Well, didn't you testify at one time you were on the fourth tier? A. Yes, but that's after the Warden came through and I advised him being in the hole — I mean, being in a cell with lice, and I wanted to be showered and deliced, and he ordered that I was taken out of the hole and given all this treatment and put on the fourth tier, yard side.

Q. You're stating that you went to the fourth tier after you left the isolated cells? A. Yes.

Q. But did you not also testify that at one time you were hollering for your law books and clothing and— A. Yes.

Q. Things of that nature? A. Yes.

Q. Well, where were you at that point? A. I was on the fourth tier, yard — yes, yard side.

(200) Q. Well, that's what I was talking about.

Now, after that hollering, isn't it a fact that that's when you were placed in the isolated confinement cell? A. That's the second time I was placed, as a result of that, yes.

Q. And you acknowledge that there were no other inmates who were in that area who were also hollering and yelling? A. No, nobody else was hollering.

Q. And all the cells in that isolated confinement area are approximately the same size, is that correct? A. Yes.

Q. Prior to this time, had you ever been placed in that area before, the isolated confinement cells, or, as you described, the hole? A. I've been in the hole quite a few times prior to that time.

(The Court) What?

(The Witness) I'm not sure, I'm not sure, but—

(The Court) Now, wait a minute, I didn't get your answer.

What did you ask him?

(Mr. Rosenthal) The question, Your Honor, was whether or not prior to this incident he had ever been placed (201) in the IC area before, the isolated confinement cells, and Mr. McCray's answer—

(The Court) Well, let him answer it.

(Mr. Rosenthal) Okay.

By Mr. Rosenthal:

Q. The answer was, Mr. McCray? A. I'm not sure, it's a possibility.

Q. There is a possibility? A. Yes, there's a possibility, I wouldn't say no or yes.

(The Court) You mean you never had been in the isolated area before this, you never had been in the hole before this time?

(The Witness) What date was this?

(Mr. Rosenthal) '71.

(The Witness) '71.

It's a possibility I wasn't in there before then.

(The Court) Why?

(The Witness) Because I was transferred from Patuxent in May of '71, I think it was, and I think that was my first time in, in the hole.

By Mr. Rosenthal:

Q. But you have been there, thereafter, is that correct? A. Yes, I have, after that.

(202) Q. And there is a possibility that you had been there prior to this November of 1971, is that correct? A. It's a possibility, but I can't recall.

Q. Now, isn't it standard operating procedure that when an inmate is placed in the IC area that he is stripped of his clothing?

(Mr. Morgan) I object, Your Honor. I don't think Mr. McCray is in a position to testify about standard operating procedure.

(Mr. Rosenthal) I'll relate it only to Mr. McCray.

(The Court) Sir?

(Mr. Rosenthal) I'll relate it only to Mr. McCray.

(The Court) All right.

By Mr. Rosenthal:

Q. Mr. McCray, on the other times that you have been placed in the IC area, isn't it a fact that you were stripped of your clothing? A. My clothes were taken, yes, and when I say stripped of my clothing, the clothing that you wear, when you go in there, your regular Penitentiary clothes, and then they give you a

jump suit, and when I refer to clothing I mean whatever I have on at that particular time.

Q. So that you did have a jump suit, or did you have a jump suit? A. When are you talking about?

(203) Q. On the time that you were placed in the IC area? A. I have a jump suit — not when I was placed in the IC area, but I had a jump suit when I came off south wing down to the IC area.

Q. Now, the wooden door that you alleged was closed—

(The Court) Now, wait a minute, I don't quite understand that.

He had a jump suit when he went down to the IC area, and they took that off and you didn't have anything on?

(The Witness) Nothing, they put me in the cell nude.

By Mr. Rosenthal:

Q. And this is the same procedure, though, with reference to yourself, that is followed when you have been placed in the IC area—

(Mr. Morgan) Excuse me.

I object to that, Your Honor.

I think any occasions of Mr. McCray having been in the IC area and what procedures might have been followed subsequent to this event would be irrelevant here.

If he can testify as of the time, that that was what he had had happen to him before, then that would be relevant, I think, but anything since then I think would be irrelevant.

(204) (The Court) Well, he doesn't know whether he was in there before, or whether he wasn't there before. He has been over, in Patuxent, since May, and this is November, and he says he possibly could have been in there, and the question was, when you went in before, or when you went in after, what was happening.

I'll permit the question.

Objection overruled.

Go on, ask him again, Counsellor.

By Mr. Rosenthal:

Q. Mr. McCray, the time that you might have been placed in the IC area prior to November, 1971, and— A. I might have been?

I don't understand that.

(Mr. Morgan) I object, Your Honor, he can't testify about something that happened at a time that might not have happened.

(The Court) Well—

(Mr. Rosenthal) Let me finish the question.

(The Court) All the times that he has been in there with the exception of this time, he can testify to.

(Mr. Morgan) Your Honor, I think—

(The Court) Ask him that question, Counsellor.

(Mr. Morgan) Your Honor, I think that if the State has a specific time in mind, that they could direct Mr. McCray's (205) attention to that and ask him what happened on that specific occasion, but these generalized questions are rather difficult for the witness to handle.

(The Court) Well, I'll permit the question.

Objection overruled.

By Mr. Rosenthal:

Q. The times that you have been placed in the IC area, have you been placed in that area without clothing? A. This was the only time I was placed there without clothing.

Q. What, if anything, happened the second day that you were in this cell, do you recall? A. The second day, nothing.

Q. Isn't it a fact that you smeared the walls of the cell with some fecal matter? A. No, it's not.

Q. Isn't it a fact that you smeared yourself—

(The Court) Wait a minute.

(Mr. Morgan) Your Honor, I object to these questions, unless the State can proffer now that they have some basis for these questions.

(Mr. Rosenthal) We will—

(The Court) Counsellor, this is cross-examination.

(Mr. Morgan) I understand that, Your Honor, but they can't just testify to some event that may or may not have (206) occurred.

(The Court) Well, Counsel, he is testing his credibility and he certainly can do that.

(Mr. Morgan) Your Honor, they can't make up fact situations.

(The Court) Sir, I will tell you that this Court is a court of law and I rule on evidence and I rule on what cross-examination might be employed in this court, and, certainly, they can test his credibility and that's exactly what they're trying to do.

Objection overruled.

By Mr. Rosenthal:

Q. Now— A. When you refer—

(The Court) What happened the second day.

All right, you said you didn't know what happened the second day, right?

(The Witness) No, I don't.

(The Court) What?

(The Witness) Nothing happened the second day that I can recall.

(The Court) All right.

(The Witness) Except for me just being in the cell.

(The Court) All right.

(207) By Mr. Rosenthal:

Q. Do you recall Sgt. Smith coming down the second day? A. Yes, yes.

Q. And you have already denied that you placed any or spread any fecal matter on the walls of the cell.

Did you place any upon yourself? A. No, I don't, never.

Q. Were you given a shower the second day? A. No, no.

(Mr. Rosenthal) One second.

By Mr. Rosenthal:

Q. Now, you testified, I believe, Mr. McCray, that the wooden door was at one time closed for a few seconds, is that correct? A. Yes.

Q. And did I understand you to say that it was the water that — I think your words were that the impact of the water is what closed the door? A. No. The impact of the water, I jumped back from the door.

Q. I see. A. And that's what—

Q. Do you remember the other officer that took you from the fourth tier down to the IC area? (208) A. Officer Baylor.

(The Court) How do you spell that, do you know, Mr. McCray?

(The Witness) B-a-y-l-o-r.

By Mr. Rosenthal:

Q. Now, Mr. McCray, did you at any time threaten to do bodily harm to yourself when you were taken down to the IC area? A. No.

(Mr. Rosenthal) Your Honor please, that would be the only questions we would have with reference to Sgt. Smith, unless this would be an appropriate time to place him—

(The Court) Well, he's on cross-examination, Counsellor.

(Mr. Rosenthal) Very well, Your Honor.

(The Court) All right.

Well, whatever you want to place in evidence by him, you can do, if you've got something and he knows about it.

By Mr. Rosenthal:

Q. Now, Mr. McCray, do you recall filing any cases with the Inmate Grievance Commission? A. Yes.

Q. Do you remember how many you filed? (209) A. Not exactly how many, no, I assume about three or four.

Q. And of the four that you filed, do you remember the results? A. Yes.

Q. Well, let me ask you this, if I may.

You filed a claim on May 7, 1971, allegedly you had been assaulted, is that correct? A. May 7, 1971?

Q. Yes, that there had been an assault on your life on May 7, 1971? A. Probably, yes.

(The Court) What?

(The Witness) Probably did, I can't remember, so many incidents that happened to me in the past year, I would—

By Mr. Rosenthal:

Q. Now—

I'm sorry. A. I would assume, you have it there, that I did file it.

Q. And do you recall that you filed IGC Number 1196 claiming that the sentence imposed upon you by the adjustment team was unfair? A. Yes, I did file that, yes.

(The Court) Sentence imposed by whom?

(210) (Mr. Rosenthal) The adjustment team, Your Honor, was unfair.

By Mr. Rosenthal:

Q. Do you recall also in that case the order that came down stating that certain items were to be reimbursed to you and that whenever there was a search, there was supposed to be two officers? A. Yes.

Q. And you received a copy of that order, is that correct? A. Yes.

Q. Now, did you also file IGC Number 1456 with reference to receiving inadequate medical care?

(The Court) Inadequate, what?

(Mr. Rosenthal) Medical care, Your Honor.

(The Witness) Yes, I did.

By Mr. Rosenthal:

Q. And is it correct that you voluntarily withdrew that complaint? A. No, I cannot recall withdrawing the case, complaint, it's not my way of doing things.

Maybe you can refresh my memory.

Q. I'll try to get that record.

And then you filed a complaint with the Inmate Grievance Commission that your mail and your law books and (211) typewriter had been seized and confiscated? A. Yes.

(The Court) Well, now, when did he file that?

(Mr. Rosenthal) There's not a date here, Your Honor, but it would have to be rather recent, because of the Number 1549, counsel will obtain for the Court and the witnesses the date upon which that was filed.

By Mr. Rosenthal:

Q. Now, with reference to that case, Mr. McCray— A. What was that?

Q. Sir? A. 1549?

Q. 1549, yes, sir. A. Yes, sir, I remember that one.

Q. Right.

Now, you received from the Inmate Grievance Commission on February 6, 1973, with reference to that case, an order holding that your claim was without merit, is that correct? A. Yes, I did.

Q. And are you familiar with the Inmate Grievance Commission Information to Inmates Form? A. Let's see this.

(Handed.)

A. What was that?

(212) Yes, I'm familiar with it. I make it a point to try to keep up on it, you know, in the institution.

Q. As a matter of fact, you received a copy of this, is that correct? A. I didn't receive a copy of it, but I'm familiar with it.

Q. You are familiar with it? A. Yes.

Q. Did you take any appeal when you received from the Inmate Grievance Commission—

(The Court) Sir?

Wait a minute, what did you say?

(Mr. Rosenthal) Did he take an appeal.

(The Court) Okay.

By Mr. Rosenthal:

Q. Pursuant to the information inmate sheet, setting forth the law on the Inmate Grievance Commission, when you received on February 6, 1973, notice that Claim IGC 1549 was held to be without merit? A. Did I appeal?

Q. Yes. A. I may have, I don't know.

Q. Well, isn't it a fact that you did not appeal it? A. No, I didn't appeal it.

See, I appeal so many cases, when you ask me, did (213) I appeal this or did I appeal that, I'm quite sure the Court knows that I appeals, and I just can't come out and say, I didn't appeal this case or that case.

(Mr. Rosenthal) I have no further questions, Your Honor.

(Mr. Morgan) We have nothing else.

Thank you, Mr. McCray.

(The Court) Well, as you say, you appealed everything, why didn't you appeal this?

(The Witness) To tell the truth, Your Honor, the Inmate Grievance Committee advises a man that he can appeal, but I just don't know exactly what and how to appeal that particular case.

(The Court) Well, now, listen, you've got—

(The Witness) Yes.

(The Court) —cases in the Circuit Court—

(The Witness) I understand.

(The Court) —the state court, you've got them over here, and you appeal everything, it's amazing that you didn't appeal, I'm just commenting on it, I don't understand it.

(The Witness) This is the whole thing, I'm familiar with how to appeal from other convictions, but this is a new thing, I don't know what to take, or what to appeal for something, if I intend to appeal. I don't know if I intend to (214) appeal, I'm not suggesting by that statement that I intend to appeal, but if I did—

(The Court) Did you get your property back, did you get your typewriter and law books back?

(The Witness) No, I did not.

(The Court) They found the claim was not meritorious, right?

(Mr. Rosenthal) That's correct, Your Honor.

(The Witness) This was not — oh, I'll tell you why I didn't appeal.

At the Inmate Grievance Committee, they would not hear the contention about the loss of the typewriter, et cetera, because it was pending before this court, that's the reason they gave me.

(The Court) Pending before this court?

(The Witness) Yes.

That's the reason they gave me.

(The Court) Why don't I remand it back there?

(Mr. Rosenthal) We would have no objection to that, Your Honor, so they could have a hearing, factual determination.

(The Court) All right, that's the only reason they didn't hear it?

(The Witness) That's the reason why they didn't hear it, that's the reason I didn't appeal that decision, they (215) say they don't have jurisdiction.

(The Court) What number is that?

(Mr. Rosenthal) That number—

(The Court) Yes.

(Mr. Rosenthal) Your Honor, I'd have to do some research to determine that.

(The Court) Well, find the number, and send it back over there, with this opinion, okay; do you have any others like that, that should go back?

(Mr. Rosenthal) Again, Your Honor, we would have to review his files.

(The Court) Okay.

(Mr. Rosenthal) Counsel does have one more question, Your Honor, if I may.

(The Court) Sure.

By Mr. Rosenthal:

Q. Mr. McCray, the claim that the Inmate Grievance Commission found to be meritorious— A. Yes.

Q. —do you recall someone from the institution, or the Inmate Grievance Commission, asking you to submit the value of the items that were found to have been lost? A. No, I don't. I've been trying — I've approached Captain — what's his name — well, one of the Captains, I've approached Major Mills on numerous occasions about it, and (216) they said that it's not in their hands, it's out of their jurisdiction, and it takes an Act of Congress to see the Warden in the institution.

So, I don't know, you can write him, I've written letters, I think you might have copies of letters I've written, concerning the property, and it just hasn't been honored, it's as simple as that.

I, for one, definitely want to be given compensation for that property, and I would be glad if somebody would take an interest.

(Mr. Rosenthal) No further questions, Your Honor.

(The Court) All right, make sure that they get a letter telling them how much the property is worth, will you, they've asked for it, Mr. Morgan.

(Mr. Morgan) Yes, Your Honor.

(The Court) All right.

(Mr. Morgan) I'm sorry, I didn't hear the question.

(The Court) I say, make sure they get a letter setting out how much the property is worth.

(Mr. Morgan) Yes, Your Honor, we will.

(The Court) All right.

Okay.

(Mr. Morgan) Your Honor, we have nothing further on the Plaintiff's side.

(The Clerk) Step down.

(217) (The Court) All right.

(Mr. Rosenthal) Well, if Your Honor please, we would move for motion to dismiss as far as Sgt., now Lt. Smith, is concerned; I don't believe that there is really anything that has been presented by Mr. McCray to show any cruel and unhuman punishment under the circumstances that exist in the instant case.

(Mr. Morgan) Your Honor, in response to that, I think Haines, which is 92 S. Ct., a 1972 case, disposes of the State's claim.

The factual allegations that were made by the prisoner there are almost identical to the factual allegations we're making in this complaint, Eighth Amendment and Fourteenth Amendment violations.

There are numerous lower court cases that have awarded relief, damage relief, to prisoners based on both Eighth and Fourteenth Amendment claims, included among which are Anderson versus Nausser, United States, ex rel Wolfe versus Neale, for example, Wright versus McMann, Sostre versus McGinnis.

We would feel that a motion to dismiss at this time for the Defendants would be inappropriate.

(The Court) Motion denied.

Proceed with your case.

(Mr. Rosenthal) Yes, we would call Lt. Smith to the (218) stand.

LT. BERNARD DAVID SMITH,

a Defendant, was called as a witness for and on behalf of the Defendants, and, having been first duly sworn, testified as follows:

(The Clerk) State your name, sir.

(The Witness) Bernard David Smith.

(The Clerk) What is your first name?

(The Witness) Bernard.

(The Clerk) Thank you.

DIRECT EXAMINATION

By Mr. Rosenthal:

Q. Mr. Smith, what is your occupation? A. I'm a Correctional Officer Number Four.

(The Court) Correctional Officer, what?

(The Witness) Four.

By Mr. Rosenthal:

Q. And to which institution are you presently assigned? A. Maryland Penitentiary.

Q. And were you there in November of 1971? A. I was.

Q. Now, how old are you, sir? A. 35.

Q. And have you finished high school? (219) A. I finished high school and I have an Associate of Arts Degree in Law Enforcement.

Q. And from where did you obtain this degree? A. Community College of Baltimore.

Q. Now, how long have you been assigned to the Maryland Penitentiary? A. I came to the Maryland Pentientiary in February, 1964.

Q. And prior to that, what was your employment? A. I was a Correctional Officer, still, but I was working in the House of Correction.

Q. And for how many years total have you been a Correctional Officer? A. 12 years and eight months.

Q. Now, you are familiar with Mr. McCray? A. Very well so.

Q. And are you also familiar with the incident to which he refers? A. Correct.

Q. Now, what was your duty assignment at the Maryland Penitentiary in November of 1971? A. I was a Sergeant in charge of the south wing, which is the segregation area for all the penal institutions in the State of Maryland.

(The Court) Sergeant in charge of what?

(220) (The Witness) South wing, which is the segregation area for penal institutions of the State of Maryland, the main segregation area.

By Mr. Rosenthal:

Q. Now, do you recall on November 19, 1971, where Mr. McCray was assigned? A. Right.

Q. Where was he assigned? A. He was assigned to the south wing.

Q. And do you recall what tier, or cell? A. Yes, I do.

See, that day was the first time I ever met him and for some reason he was supposed to be locked up in the south wing and I put him on the fourth tier, street side, the particular cell I don't remember.

Q. Was there any particular reason why he was placed street side? A. No, it's a cell like any other cell and it was an available cell, which everything was operating in it, I mean by that, the toilet, light fixture, sink, and it had bedding, and so forth, in it, this is the reason why I placed him in that cell.

Q. All right, and then what, if anything happened? A. Well, after he got up there for a while, he started screaming, you know, real loud, as a matter of fact I never (221) heard a man scream this loud before, so I thought I better go up myself to find what the problem was.

Well, when he started screaming, it seemed as though a lot of the other inmates in this area, maybe they knew

him, or something, they didn't get along with him, and it was causing a disturbance, they were telling me I better get him off that cell, off this tier, because they didn't want to be involved in all this noise, they couldn't sit and concentrate or talk with their buddies with him raising all this ruckus up there.

This is the reason why I transferred him off that tier.

Q. And which tier did you take him to? A. I took him around the other side of the fourth tier, yard side.

Q. Now, when you refer to street side and yard side, would you describe this a little clearly? A. Well, street side is facing Forrest Street, Greenmount Avenue area, you know, the people walking up and down the street can hear the noise real loud. If I put him on the other side, well, the noise would go into the compound, that's facing the yard area.

Q. Now, when you say facing, are you talking about the cell door, the window, or— A. The cell door.

(222) You see, at this particular time on the street side, the windows was just like windows like that, you know, they weren't covered, or anything like that, and the noise would carry on out to the street.

Q. Now, what, if anything, took place after you placed him on the fourth tier, yard side? A. Well, when I placed him on the fourth tier, yard side, he deliberately tore off a locker off the wall.

(The Court) What?

(The Witness) A locker.

In each cell, we also have a wall locker, on the wall, and this he was using to bang against the cell wall, on the next cell, and he was hitting on the floor, banging, and he had torn up the mattress, and everything.

All right, I went back up on the tier, and at this time was the time for feed-up, it was around 11:30 in the day, and it was causing disturbance on the other side.

So, I decided to bring him downstairs, this is when I put him in the IC area.

By Mr. Rosenthal:

Q. And was any — did anyone help you to take him to the IC area? A. Well, there's a standard rule, we always have another officer with us when we open the door, so I did have another officer with me.

(223) Q. Would that be Officer Baylor? A. I don't recall, Baylor or Hendricks, it was one of the two.

Q. All right.

Now, what transpired when you went down to the isolated cell area? A. Well, we went down to the isolated cell area, what I did, I handcuffed him, and he walked of his own free will, nobody carried him anywhere, and he was talking, you know, like he was going to do harm to himself, tear this up and hurt himself, so the first thing got into my mind, I say, well, if he hurts himself it won't be caused by my negligence, so this is when I stripped him.

Q. And what, if anything, did you remove from the cell? A. At that time, I removed his mattress, all his clothes. Well, it's a policy when you take a man down to strip search him anyway, but I didn't give him his coveralls back, because he was talking about doing harm to himself, and the only thing that he had in his cell at that particular time was a toilet and the sink.

He had a light in the cell, it's recessed in the wall whereas he can't get to it to break the bulb to cut himself with the glass.

Q. Now, why did you remove the mattress? (224) A. Well, I've seen inmates take a mattress and tear it up into strips and make a rope out of it and use it to hang himself.

I'm not saying that he would hang himself, but it has happened, you know.

Q. So, you took the mattress and clothes for what reasons? A. For reasons he wouldn't do harm to himself.

See, at this time, I didn't know him very well, this was almost — I had just met him really that day, so I

didn't know what type of personality or attitude he was, you know.

Q. Did you return the next day when you went on duty? A. The next day I did return and, actually, when they put a man in IC, you have an officer in that area to check him every half hour, and the next day I did return and take a look at him in the morning, always do this myself.

Q. Which shift were you working? A. 8:00 to 4:00.

Q. 8:00 in the morning to 4:00 in the afternoon? A. Right.

Q. And when you went back to check on Mr. McCray, what, if anything, did you discover? A. When I went back to check on this particular (225) inmate, actually, when I went into the IC area, you know, the smell was unbearable.

What he had done, he had defecated into a cup and then smeared it all over himself and all over the cell wall, and he had even wrote a name up there, his nickname is Black Hawk, and he wrote this with this human waste on the wall.

So, right away, I said to myself, I can't put him back up on the cellblock when he's in that position he's in now. This is when I got hold of Mr. Musk, he was the psychologist who comes over to the south wing.

After that, I had to shower him right away, and I had two tier runners, and the tier runner is an inmate who works in the area, to scrub the cell around.

Q. And was Mr. McCray kept on isolation? A. He was still in isolation.

Q. And do you recall when he was taken back to the south wing? A. I think he stayed there two days and he started acting all right, and I put him back up on the tier, the third tier, I believe I put him on, 325 I believe it was, that's on the yard side, also.

Q. Now, at any time did you throw water on Mr. McCray? A. Never did.

Q. At any time did you drag him down the steps? A. He walked of his own free will.

(226) Q. Well, what is the — strike that, please.

(Mr. Rosenthal) Your witness, Counsel.

CROSS EXAMINATION

By Mr. Morgan:

Q. Lt. Smith, this incident that you described as the second day, that would have been November 21st, 1971, when you went into the cell area, isolated area, and found fecal matter spread on the walls? A. I'm not sure what day it was, but it was the next day after he came into the isolation cell.

Q. You're absolutely sure that this was during the same period of time? A. Yes.

Q. Mr. McCray has been in the isolated confinement cell numerous occasions, hasn't he? A. Right.

Q. To your knowledge? A. Yes.

Q. But you're absolutely sure that this particular incident that you're describing occurred on November 20th, or November 21st, rather, 1971, and it did not occur at some later time? A. It occurred right after that, the second day.

Q. You're absolutely sure of that? A. Right.

(227) Q. Did you write up a report on that? A. I should have, I'm not sure, because sometimes everything happens at the same time and you don't get a chance to write reports, but, actually, he wasn't doing anything to harm anybody and I probably didn't bring that to any priority, because I think I was locking up some more people at that time.

Q. Did you write up a disciplinary report on the spreading fecal matter on the walls? A. That's what I'm talking about.

You see, him spreading this matter — I could have done it, but him spreading this matter on the walls wasn't harming anybody, it wasn't a security risk, it was just him, it was his matter, see, so no other person got involved in it.

Q. Did you make a record of that in the south wing log book? A. I might have. I had to call Mr. Musk, I had to make sure the psychologist came over the same day.

Q. Would you have made a notation in the log book of those things? A. I should do it, I might have done it, I'm not sure.

Q. If Dr. Musk had visited Mr. McCray in isolated confinement, would there have been a record of that in the south (228) wing log book? A. He makes his own records.

Q. There would have been no record of that in the south wing book? A. Usually, he comes over at random, he comes over a day, maybe two or three days from now, maybe two or three days in a row.

Q. Okay.

Now, can you identify this, Sgt. Smith, is this the south wing log book? A. That's one of them, there's more than one.

Q. Well, referring you to Page 194, at the top of the page, it's dated 11/20/71, 8:00 to 4:00 shift. A. Yes.

Q. Would that be what had occurred on that day? A. If it's written in here, everything that happens is not written in here.

Q. Is it normally your practice to write down disturbances that occur in south wing? A. We try to, it depends. You see, sometimes there could be a major disturbance happen some place else, most of the officers have to leave one area and go where the excitement is at, and some things never get down.

Q. Well, on this particular day, November 20, 1971, do you see any notation there written by yourself, or anyone (229) else, of any disturbance occurring on south wing? A. No.

As a matter of fact, that's not my handwriting, that's the clerk.

Q. Do you see anything there referring to Milton McCray on November 20? A. No.

Q. There's no notation here of Milton McCray participating in a disturbance, is there, or causing a disturbance? A. No, I didn't say he participated in a disturbance. The disturbance he was involved in was his own.

Q. Well, you testified that when he was in his cell on the third or fourth tier, yard side— A. Right.

Q. —that he was banging on his cell walls? A. That's the reason why he was taken out of the cell.

Q. Yelling out the door, causing a disturbance? A. Right, that was his disturbance, nobody else joined in.

Q. Oh, I see.

Well, under those circumstances, why was it necessary to take him out of his cell and put him in isolated confinement? (230) A. Because if he stayed in that area there, causing this noise, then I would have a chain reaction and the other inmates may have joined in and I would have really had a major disturbance.

In this case, I was dealing with one man, so, to me, security wise, better to deal with one than twenty.

Q. It could have caused a disturbance, but at the time when you moved him there was none? A. Right.

But even the inmates was yelling to move him.

Q. Lt. Smith, I show you the entries on the 8:00 to 4:00 shift, November 21st, 1971, which would have been the next day, and I ask if there is anything there that indicates anything about the Plaintiff, Mr. McCray? A. Nothing in here.

Q. There's nothing written there about his having spread fecal matter on the walls of his cell? A. No, but I don't think he would deny it.

Q. Going back to the original incident, not the incident you say occurred in the isolated confinement area, this creating a disturbance incident.

Did you write up a disciplinary report on McCray for that and submit it to the adjustment team for their disposition? A. I'm not positive, I believe I did, but I'm not (231) positive.

I know every time I move a man from a wing to an isolated cell, I have to get it approved by a Captain, or above.

Q. Right. A. To document it.

You just can't put an inmate in isolation on your own free will.

Q. Right.

Well, what I'm asking, Lt. Smith, is not whether you got approval from the Captain, but whether or not you wrote up a disciplinary ticket on Mr. McCray for a violation of prison rules? A. I should have.

Q. Do you recall whether or not you did? A. Well, I'm not positive of that.

Q. Do you have any records here today that would indicate that you did? A. No, I didn't bring any records.

Q. All right, if you wrote such a report, I assume it would be in Mr. McCray's file? A. It should be in his folder.

Q. Do you recall, Lt. Smith, going to an adjustment team, or a disciplinary hearing in this case, perhaps that would refresh your memory? (232) A. Well, his cases, I never went to one of the hearings.

Q. You don't recall testifying before an adjustment board about creating a disturbance? A. Well, if I wrote him up, I wouldn't have to go there and testify, what I put on paper should be sufficient.

Q. Lt. Smith, if you see a violation in the institution, I assume it is your practice to write up a disciplinary ticket? A. Right.

Q. Sgt. Smith, could you describe the isolated confinement area physically? A. Well, it's—

(Mr. Rosenthal) Your Honor, I object, unless counsel is going to lead into something other than what Mr. McCray said.

(Mr. Morgan) Well, Your Honor, we feel that this is important for corroboration of what Mr. McCray said.

(The Court) Well, I'll permit it.

By Mr. Morgan:

Q. Would you describe for us briefly, Lt. Smith, the isolated confinement area, the cells, what's in the cells, how large they are, and the doors? A. Well, the isolation area had six cells, and I guess the cells are, maybe, about, maybe ten by five, or ten by (233) seven feet, I'm just guessing now.

They have a toilet and a sink, which are two separate units. They have a light which is recessed at the back of the cell, behind a thick glass which cannot be broken.

Water can be turned off in the back of the cell, you know, just in case, maybe, the inmate starts flooding, and it has a — maybe about as high as this first step here, the same size the mattress is, and the mattress goes on top of it.

The walls are made out of cement, so is the ceiling. And then you have a grill door with maybe a twelve inch opening in it by three and a half inches high for food to be passed in to the inmate; and then you have a solid wooden door on the front of that, which has a peephole that you can — if the door happened to be closed and locked, you can look and see how the inmate is doing.

There's a storeroom officer back there at all times who takes the inventory of property when the man comes in that area.

You see, we use that area, also, for incoming inmates, to search and check them down, strip search.

Q. Sgt. Smith, can you identify this piece of paper — or Lt. Smith? A. Ahuh. This is — we use something similar to this, (234) not exactly like this. This writing on here is done by the clerk, that's his handwriting.

Q. Which clerk is that? A. His name—

Q. No, I mean, where is he stationed in the institution? A. Stationed at the desk.

Q. South wing desk? A. Yes, in the IC area.

Q. I see.

Is this a report that was made by him on the day that Mr. McCray was put into IC? A. It looks to me like his writing, but we don't use this kind of — a different kind of paper.

Q. Well, this is a Xerox copy.

Did you use it at that time? A. We don't have a form made up like this at all.

Q. You've never seen this form before? A. Not this particular form here.

We have a long yellow form.

Q. You are aware of these forms being used— A. Not them, not that—

Q. You've never seen these forms in the south wing? A. Not that particular kind of form, no. We have a long yellow form, and I'll show it to you any time you come (235) over to the Penitentiary.

Q. Where do you think I got this? A. Well, I don't know where you got it at, but I notice you have Cell 232 on that.

(The Court) What about that?

(The Witness) That's protective custody tier, and this is not a protective custody man, I know that.

By Mr. Morgan:

Q. Sgt. Smith, can you identify this book, and, specifically, this page?

(The Court) What is the number of it, Counsellor?

Has it got a number?

By Mr. Morgan:

Q. This is Page 41 of what book, Sgt. Smith? A. That's my writing.

Q. Is this your writing at the bottom? A. Yes, that's mine.

Q. Can you read what it says? A. It says, McCray had a shower today, also put in—

(The Court) What?

(The Witness) It says, Milton McCray had a shower today, and this is the 20th, also put in IC5 at 1:00 p.m.

(The Court) Wait a minute, had a shower today, and also, what?

(The Witness) Put in IC5 at 1:00 p.m.

(236) By Mr. Morgan:

Q. And this is Page 41 of what book? A. The log book, south wing desk.

(Mr. Morgan) Your Honor, the Plaintiff would move to admit this book, or this page.

(The Court) Well, why don't you all Xerox it and get it back to him.

(Mr. Morgan) Fine.

(The Court) All right?

(Mr. Morgan) Yes, Your Honor.

(The Court) All right.

Let me see it, would you please?

(Handed.)

(The Court) This shows 11/20/71, Saturday. Right, had shower today, also put in IC Number 5, what's IC Number 5?

(The Witness) That's a punitive cell, which he was referring to as the hole.

(The Court) Oh.

By Mr. Morgan:

Q. Sgt. Smith, are you familiar with the isolated confinement log book? A. May I see that, too?

(Handed.)

(237) By Mr. Morgan:

Q. These are Xerox copies of pages from that book, can you identify them, can you identify them as Xerox copies of pages from that book? A. Ahuh.

Q. This is Page 9 of the isolated confinement log book, Your Honor; and specifically directing your

attention to November 20th, 1971, 8:00 to 4:00 shift.? A. Ahuh.

Q. What does it indicate there with regard to Isolation Cell Number 5? A. It says, IC Number 5, 110563, Milton McCray. He was housed in the particular cell this particular date.

Q. And that's your signature? A. That's my signature.

Q. Can you read the next entry? A. Down here?

Q. Yes.

Can you read the date and the shift and also the entry? A. It says — well, the date I can't make out, but it says, check IC area, found all three inmates doing okay. 9:00 o'clock, Milton McCray—

(The Court) 9:00 p.m., or what?

(The Witness) a.m., it should be. I guess it's a.m.

(238) I think this is the 4:00 to 12:00 log here, splitted his mattress and crawled between the cotton lining.

I think the 4:00 to 12:00 officer put this on, this is not my writing at all, and this wasn't signed, either.

By Mr. Morgan:

Q. Now, I show you Page 10 of the same book, Sgt. Smith, referring your attention to 11/21/71, the 8:00 to 4:00 shift again.

Again, Milton McCray is indicated in IC Number 5, is that correct? A. Ahuh.

Q. And that's your signature next to it, isn't it? A. No.

That's 12:00 to 8:00 shift — oh, right here, yes.

Q. That's your signature indicating Mr. McCray is in Cell 5? A. Right.

Q. Is there any notation there of any incidents having occurred in Cell Number 5? A. That wouldn't go in this book, all this book specifies is who is in what cell.

Q. In other words, if Mr. McCray had spread defecation on the walls of his cell, it would not appear

in the IC log? A. If he had hung himself, it wouldn't be in this log (239) here.

Q. Well, you've just read an entry where he had split his mattress— A. I didn't put that in there, it shouldn't have been in there. The 4:00 to 12:00 officer put this in there, and nobody signed it.

Q. But as far as your practice is, you would never write anything in this log book except who was in the cell? A. Right.

Q. And your entry indicates that Milton McCray was in the cell on the 20th and 21st? A. Right.

If you keep looking through there, you'll see almost exactly alike.

Q. All right, fine.

(Mr. Morgan) Your Honor, we would also like to introduce these two pages, Pages 9 and 10, and, again, they will have to be Xeroxed.

(The Court) All right, this is going to be number what?

(The Clerk) That's Page 41 of — what log book is this?

(Mr. Rosenthal) The south wing.

(The Clerk) The south wing?

(The Witness) Yes.

(240) (The Clerk) Page 41 of south wing log book will be Plaintiff's Exhibit Number 1.

(Document was marked Plaintiff's Exhibit No. 1.)

(The Court) In this case?

(The Clerk) Yes, sir.

And the other two pages—

(Mr. Morgan) These are from the isolated confinement log book and I would assume that they would be—

(The Clerk) 2A and 2B.

(Documents were marked Plaintiff's Exhibits Nos. 2A and 2B.)

(The Court) 2A and 2B?

(The Clerk) Yes, sir.

(The Court) All right, Counsellor.

By Mr. Morgan:

Q. Lt. Smith, can you identify this? A. Yes, this is the handbook for inmates, which was revised with the blue book that you have there now.

Q. This was in effect in— A. July, '71.

Q. This was in effect in November, 1971, wasn't it? A. When did this last one come out?

Q. The last one came out, I believe, after the riots last summer. (241) A. We'll say it was in effect then.

Q. It was in effect.

Directing your attention specifically, Lt. Smith, to Pages 22 through 30. A. Ahuh.

Q. That sets forth adjustment violations in the institution? A. Right.

Q. Does it not? A. Right.

Q. And on Page 25, various adjustment procedures are set forth, isn't that correct? A. Ahuh.

(Mr. Morgan) Your Honor, we would introduce as Exhibit 3 these Xerox pages from the book which Lt. Smith has identified.

(The Clerk) Marked Plaintiff's Exhibit No. 3.

(Document was marked Plaintiff's Exhibit No. 3.)

By Mr. Morgan:

Q. Those pages provide the procedure for disciplinary hearings in the institution, don't they, Lt. Smith? A. Supposed to.

Q. Can you identify this, Lt. Smith? A. Ahuh.

(242) Q. Could you explain to the Court what that is? A. This is an Administrative Directive put out by the Deputy Commissioner, James Jordan.

What it does is pointing out that punitive or isolation cells will be used only when an inmate is emotionally disruptive, and used for a cooling off period, and it can be enforced from one hour up to the time the inmate is reasonably calm enough to go to a segregation area.

So, I mean, that could be one hour to 90 hours, depends upon the inmate.

Q. Directing your attention to the last paragraph where it states:

The psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four hour period. A. Right.

Q. My question is, first, in this particular case, did you within 24 hours of 1:00 o'clock on 11/20/71 contact a psychologist or a psychiatrist and inform him or her that Milton McCray was in isolation? A. I explained to you not long ago that after the human waste, I called the next morning, it was less than 24 hours.

Q. And at that time, the inmate was evaluated? A. Whatever he did, I don't know what he did, he went (243) back there, talked to him.

Q. You're absolutely sure that on this particular occasion, Milton McCray spread his own waste in that cell? A. Well, he was the only one in there at that time, so I imagine it would have to be him.

Q. Couldn't have been a different time? A. Well, when he went in the cell, there wasn't any waste on the walls and there wasn't on him, so where it came from, I don't know.

(Mr. Morgan) We will introduce this, Your Honor, we would move to introduce this as Plaintiff's Exhibit Number 4, I think.

(The Clerk) A Xerox copy.

(Mr. Morgan) This is a Xerox copy of the Administrative Directive.

(Document was marked Plaintiff's Exhibit No. 4.)

By Mr. Morgan:

Q. Mr. Smith, or Lt. Smith, I'm sorry, during this period of time when you were Sergeant in charge of the south wing area, did you have the authority to place an inmate in the isolated confinement area? A. Right, I then notified my immediate supervisor.

(The Court) Wait a minute, excuse me.

What did you say?

(244) (The Witness) I said, yes, and then I notified my immediate supervisor.

By Mr. Morgan:

Q. Are there any written policies or regulations of the south wing that indicate how long a person is to be kept in isolated confinement? A. I think you just showed me that, didn't you?

Q. That policy is a directive of the Division of Correction, my question is whether there are any specific policies of the south wing, internal institutional policies, that govern how long a person is to be kept in the isolated confinement area? A. Well, we only have a verbal thing, that was from word of mouth, that a man shouldn't stay in there for three days.

Q. And was that— A. And with me, I've always had a policy of my own, not to keep a man over but one night, the next day, you know, depends on the man.

Q. Lt. Smith, do you recall testifying in a deposition in this case on June 7th, 1973? A. Right.

Q. I read to you from Page—

(The Court) June the 7th, Counsellor?

(Mr. Morgan) June 7th of 1973, yes, Your Honor.

(245) (The Court) Ahuh.

By Mr. Morgan:

Q. I read to you from Page 11 of that deposition:

Question, do you know how long McCray spent in that confinement at that time?

Answer, I don't know. It's a policy with me, I don't keep a man in there over three days, if I had seen he

was improving I would take him out and put him back up on the cellblock.

Your testimony here today is that it was the institution's policy that a man would not be kept there for three days, but that it was your personal policy that you would not keep a man there more than one day, is that correct? A. Right.

Q. In your deposition, you testified, it was a policy with me, I didn't keep a man in there over three days. A. Depending on the man, and some people, being as you are on the subject, some men, like McCray himself, came back to live in the IC area, he lived there for a matter of months.

(The Court) He did what?

(The Witness) He lived in the IC area.

(The Court) What did he do, what did you say?

(The Witness) Let me explain this to you, Judge.

(246) (Mr. Rosenthal) Lived, Your Honor.

(The Witness) He lived there, Judge.

He lived there, sir. Now, after I got to know Milton McCray pretty well, he always called me and talked to me, so we talked like normal men would talk, and he asked me one day could he come down to the IC area and live there and do his time there, and his, of course, personal belongings, like his law, court papers, which is about four boxes full, so at that time I wasn't up tight for a cell of this type.

(The Court) What?

(The Witness) At this particular time, I didn't need this type cell because I didn't have any problems, so I permitted him to go in there and live, if he wanted to, so this was his choice.

(The Court) Well, this was after this incident, wasn't it?

(The Witness) Right.

I mean, beings we were talking about the area, IC area, the number of days a man stayed there, but on his

own request, if I didn't need a cell and you wanted to live in there, it's perfectly all right with me.

By Mr. Morgan:

Q. Well, on this particular occasion when Mr. McCray requested to live in these cells, did he not also request to live in his cell with a mattress? (247) A. Then he had a mattress, because I just told you a minute ago, we used to talk, he had calmed down enough that he had learned a little about me, I had learned a little about him, so we corresponded like men should.

So, he asked my permission, could he come down to live in the IC area. So, I said, why do you want to live there? He said, I can be away from this noise and I can do my legal work. So, I said, good enough.

So, every morning, down in the area doing his legal work. He asked me for paper and pencil and writing material, which I gave him myself.

Q. Sgt. Smith, on that occasion you're describing, Mr. McCray had his clothes in his cell, didn't he? A. Had his clothes and anything else he might want, right.

Q. In other words, his cell during that period of time was exactly the same as the cell in the south wing, except he was in a different area? A. Right.

Q. Now, the time we're talking about, Mr. McCray was in the cell without any clothes at all, is that correct? A. Correct.

Q. Without a mattress? A. Right.

Q. Without anything else in his cell? (248) Right, because he had displayed himself differently then.

Q. I see.

But on the occasion when Mr. McCray put himself there voluntarily, to get away from the noise— A. That was different.

Q. —he had exactly the same conditions of confinement as had he been on the south wing? A. Right. Maybe a little better.

(The Court) Is that right, Mr. McCray?

(Plaintiff McCray) All except — to a degree.

(The Court) What?

(Plaintiff McCray) To a degree, yes. I mean, as far as the conditions of the cell at that particular time.

I didn't volunteer to go in the hole, that part he's exaggerating on.

(Mr. Morgan) Your Honor, we'll be glad to have Mr. McCray testify.

(The Court) Yes, we'll have him testify to everything he has got.

(Mr. Morgan) Your Honor, in case there's any confusion about this point, we're not challenging these cells per se as a place in which to live, we're merely saying that a person cannot be put in them under the conditions Mr. McCray was put in them.

(249) (The Witness) I would like to say something about that, too.

(Mr. Morgan) Well, Lt. Smith, you have to respond to my questions, if you don't mind.

(The Court) Well, are you going to be a little while?

I think we might as well go to lunch and come back at 2:00.

(Mr. Morgan) I wouldn't expect to be too much longer, Your Honor.

(The Court) Well, I think maybe that's best, and then we'll go on to the other things we have to do.

All right.

(Mr. Morgan) Your Honor, if the Court would have no objection, the Plaintiff would prefer to litigate the Rutherford case on Thursday, if possible. We would prefer to have some time to further discuss that case.

(The Court) What about Burrell?

(Mr. Morgan) Well, Your Honor, I think the Burrell case is not going to take all day Thursday and I think Mr. Rutherford's case—

(The Court) Well, if it does like this, it will, won't it?

(Mr. Morgan) Well, no, Your Honor, I think if we can start at 10:00 o'clock, we'd be finished by the lunch (250) break, in the Burrell case.

(The Court) Is that all right with you, Mr. McCray?

(Plaintiff McCray) I think so.

If he thinks so, I think he's better qualified than I am to decide.

(Mr. Morgan) We would prefer to have that extra day.

(The Court) All right, we'll talk about it when we come back, I can't give my life to Mr. McCray.

(Whereupon, at 1:05 o'clock p.m., a luncheon recess was taken until 2:00 o'clock p.m.)

(251) AFTERNOON SESSION

(Met, pursuant to the taking of the recess, at 2:15 o'clock p.m.)

LT. BERNARD DAVID SMITH,

resumed the witness stand, and, having been previously duly sworn, testified further, as follows:

(The Clerk) Just be seated, Lieutenant, you are still under oath, sir.

CROSS EXAMINATION (Resumed)

(Mr. Morgan) Your Honor, with regard to the case against Mr. Rutherford, Mr. Rosenthal and I talked about it during the break, and I suggested, and I think Mr. Rosenthal has no objection, if we could take that case at 10:00 o'clock on Thursday morning, we feel it would take no more than half an hour to litigate that case, and the Plaintiff would certainly appreciate having that time, if possible.

(Mr. Rosenthal) For the record, Your Honor, Mr. Rutherford is here, we are prepared to go ahead, but subject to whatever the Plaintiff and/or the Court decide.

(The Court) Well, why do you want to take it at that time?

(Mr. Morgan) On Thursday, Your Honor?

Well, quite frankly, Your Honor, the problem has been that we are dealing here with four separate cases.

(252) (The Court) I know that.

(Mr. Morgan) And, quite frankly, we are not as well prepared in the Rutherford case as we would hope to be. I think we could go ahead today because the factual issues are very simple.

(The Court) Just whether he got it or didn't get it, isn't it?

(Mr. Morgan) Well, that's pretty much it, Your Honor, but I think we could do it in a more organized and orderly fashion if we could have the time between now and Thursday morning.

(The Court) How long is the Burrell case going to take?

(Mr. Morgan) Your Honor, in the Burrell case, the Plaintiff would testify and Dr. Gould would testify on his behalf, I don't know what witnesses the Defendant would call.

(Mr. Rosenthal) Your Honor please, we would have the Defendant and a minimum of one additional witness or probably two. I'm not sure we would finish that in one day, Your Honor, to be quite frank with you, and I'm basing that upon the time — of course, we did get a little late start today, but the time this case has taken with just, basically, Plaintiff and the Defendant. If the Plaintiff intends to have the doctor and the Plaintiff, and I know we (253) will have an absolute minimum of two witnesses, I'm reasonably sure the case would probably go over to Friday.

(The Court) Well, Mr. Morgan, what kind of — what are you looking for in the Rutherford case, that you haven't got already?

(Mr. Morgan) Well, Your Honor, I think probably the facts in the case we could stipulate to, Mr. Rosenthal and I, we haven't discussed exactly what records we would stipulate to except that I would think anything in

the court files the Defendants would have no objection to entering as evidence here, and that's pretty much our case.

We have no other evidence, other than Mr. McCray's testimony that he mailed certain petitions in to the court, received certain letters back from the court, but the court files—

(The Court) It only involves one case, doesn't it, that he claims to have mailed in?

(Mr. Morgan) It involves two, I believe, Your Honor, two complaints that were mailed to the court and not docketed.

(Mr. Rosenthal) My recollection was that there was one, Your Honor, from the pleadings, but I may be mistaken, also.

(The Court) Was what?

(Mr. Rosenthal) Just one, if I recall correctly, from the pleadings, there was just one writ or petition that (254) the Plaintiff sent in that he alleges was not properly docketed.

(The Court) Well, why don't we take what testimony we can in that case today, Mr. Rutherford is over here, we can take that, and if you want to put on something on Thursday, you can do it, okay?

(Mr. Morgan) All right, sir.

At the conclusion of this case?

(The Court) Yes.

(Mr. Morgan) Fine.

(The Court) All right.

(Mr. Morgan) Maybe Mr. Rutherford could just be on call, unless he wants to watch the rest of this case, we have no objection to that.

(The Court) Well, we've got some other people to go on here.

Mr. Rutherford, what do you want to, stay over here or do you want to go back?

I hate to bring you back and forth, that's all I'm thinking about.

(Mr. Rutherford) Your Honor, I'll do whatever counsel and Your Honor thinks best.

(The Court) How much longer are you going to be in this thing, do you think?

(Mr. Rosenthal) Well, if Your Honor please, we would (255) have as of this moment no redirect of Lt. Smith and I think we are rapidly approaching the end of cross-examination by Mr. Morgan, but we do have in the courtroom Major Mills and Warden McCallan for the purposes of substantiating the matters in the letter of October 17, 1972.

Now, assuming that the examination on direct, Your Honor, would go merely to this letter, the contents and the information thereof, and I assume that cross-examination would be limited to those points, which would not be that long.

(The Court) All right.

Well, then that means about an hour, Mr. Rutherford, do you want to stay around?

(Mr. Rutherford) I'll wait, Your Honor.

(The Court) You may get something over there that should be filed, and then file it and you can be back over here.

That's all right.

(Mr. Rutherford) Thank you, Your Honor.

(Discussion off the record.)

(Mr. Morgan) Your Honor, prior to the break, there were some articles of evidence that we had to have Xeroxed and during the break I submitted those to the Clerk and they have since been filed.

(256) (The Court) All right.

(Mr. Morgan) In addition to that, the Plaintiffs and the Defendants have stipulated to Plaintiff's Exhibit 5, I believe, which is a notice of offense and adjustment team report.

(The Court) What is it?

(The Clerk) Notice of offense.

(Mr. Morgan) Notice of offense, Your Honor, dated November 20th, 1971, and an adjustment team report dated the same day.

(The Clerk) Marked Plaintiff's Exhibit No. 5.

(Document was marked Plaintiff's Exhibit No. 5.)

(Mr. Rosenthal) For the record, Your Honor, instead of a stipulation, I think it would be better to state that we have no objections.

(Mr. Morgan) Fine.

In addition to that, Your Honor, during the initial stage of cross-examination of Lt. Smith, I showed him and he identified and read from Pages 194 through 197 of the south wing log book, and although I don't think I formally introduced those pages into evidence at that time, I would like to do so now, we have Xerox copies of them.

(The Clerk) The south wing log book.

(Mr. Morgan) This is the south wing log book, Pages (257) 194 and—

(The Court) Well, we did introduce that, didn't we, Mr. Graham?

(The Clerk) We have Page 41, Your Honor.

(The Court) Oh, this is different?

(Mr. Morgan) We have Page 41 of the south wing desk book, I think.

(The Court) Oh.

(Mr. Morgan) This is the log book, and we also have Pages 9 and 10 of the isolated confinement log book.

(The Court) Well, I thought those were in.

(The Clerk) This will be marked Plaintiff's Exhibit Number 6.

(The Court) What is it?

(The Clerk) 6, sir.

(Document was marked Plaintiff's Exhibit No. 6.)

By Mr. Morgan:

Q. Lt. Smith, can you identify this document? A. This document here?

Q. This entire package.

(Mr. Morgan) For the record, this is a package of about one and a half inches in width, it's a file with a sheaf of papers in it.

(The Witness) It looks like a folder to me.

(258) By Mr. Morgan:

Q. The base file from the institution on Mr. McCray? A. Right. That's his there, it looks like.

Q. All right, sir.

I direct your attention to a sheet of paper placed in approximately the middle of the base file with Milton McCray's name on it and the institutional number 110563 with a notation, received 12/30/71, and I'm asking if you can identify the writing there? A. It looks like the clerk's writing.

Q. The south wing clerk? A. Right, his writing looks like that.

Q. Can you read the writing? A. It says, placed in IC Number 3, at own request.

(The Court) Placed in IC, what?

(The Witness) Number 3, at own request.

That's the third cell in the IC area.

(The Court) What's the date of it?

(The Witness) 12/30/71, and—

(Mr. Rosenthal) Your Honor please, unless there is some relevancy, December 30th, it's six weeks later.

(The Witness) According to this thing — I'll read the whole thing all over again.

(Mr. Morgan) Well, we feel this is proper cross-examination, Your Honor.

(259) (The Witness) Wait a minute. Placed in IC3 at own request. Defecated and spread throughout cell, ordered to MO.

(The Court) And did what?

(The Witness) Defecated again.

(The Court) Yes.

(The Witness) Which I was talking about earlier.

By Mr. Morgan:

Q. Well, Lt. Smith, it does not say, defecated again. A. I'm saying this.

Q. All right.

Do you recall two incidents of Mr. McCray defecating in his cell between November 20, 1971, and December 30, 1971? A. The only incident I recall is one, I don't recall this one here, but it's possible, it could have happened.

Q. Isn't it possible that this is the incident to which you were referring? A. No, because, actually, he did it numerous times, but the times before that he had done it, I don't know anything about. I did read somewhere in his base file.

Q. In any event, this is an incident of his defecating in the isolation area cell on 12/30/71? A. Well, as I said before, things that should be documented, everything is not documented like it should be, and (260) it may be an error on my part.

Q. But this particular instance was documented? A. That particular one was documented by the clerk.

Q. Now, on the incident that you described this morning, I believe that would have been November 21st, 1971? A. Ahuh.

Q. When you went to his cell in the morning, I believe you testified, and you witnessed his defecation on the walls of the cell and the name, Black Hawk, spelled out? A. Yes.

Q. In defecation in the cell, was there anyone else there with you at that time? A. Officer Hendricks was there, and I don't know any other officers that were there, but I did get the tier runner to come there for clean-up, his waste material.

Q. Is Officer Hendricks still there, a Correctional Officer at the Penitentiary? A. Right.

Q. Did you have an opportunity to discuss this matter with Officer Hendricks before you testified today? A. No.

Q. You also testified that after this incident you requested that the psychologist, Dr. Musk, a Mr. Musk, see Mr. McCray, is that correct? A. That's what I said.

(261) Q. Now, when did that occur? A. The same day that he defecated on the wall.

Q. And when did Mr. Musk come to the isolated confinement area and see Mr. McCray?

(The Court) How do you spell this?

(The Witness) M-u-s-k.

He came prior to the noon feeding, you know, the noon meal, which starts at 11:30.

By Mr. Morgan:

Q. Did you talk to Mr. Musk at that time? A. I told him who I wanted him to see, so he talked to Milton McCray.

Q. And the very next day, Mr. McCray was released from isolated confinement? A. I believe he was.

Q. Was he released by you personally? A. Well, he was put back up on the tier.

Q. Sgt. Smith, going back to the beginning of this incident on the tier, you said Mr. McCray was making a disturbance and causing some noise, did Mr. McCray say anything to you when you went to his cell? A. Well, the first cell he was in, or are you talking about the second cell?

Q. The second occasion. (262) A. The second occasion, when I put him down in the IC area.

Q. Just before you put him in the IC area, did you have occasion to talk to Mr. McCray? A. He was making derogatory statements to me, but that happens all the time, but with any derogatory statement he was talking about doing harm to himself, this is the reason why I disrobed him when I took him down, for precautions, of hurting himself.

Q. What specific harm was he suggesting he would do to himslef? A. Well, he didn't make any specific harm, but he said he wasn't going to do any time in the south wing, he would rather die than do time in the south wing, and so, that was enough for me to see that he might do something to injure himself, that's why I took precautions.

Q. Isn't it true that he asked you about his law books and requested— A. Yes, he asked that all the time, the minute he comes in the door he asks that.

Q. Was there any reason why you couldn't have given him his law books on that day? A. Yes.

Q. Why was that? A. When he first came over to the south wing area, (263) nobody had had time to pick his law books up from his previous cell and inventory what he had, so when a man first comes in the south wing area, he comes in himself. The law books, and what have you, follow.

Q. Didn't you testify that he had been on south wing since the 17th of November? A. Yes, he came on the 17th of November.

Q. Well, that would have been three days, does it normally take more than three days? A. It may take a week.

Q. For his personal belongings? A. That's right, it depends on how many people come over that particular time.

Q. I see.

Didn't Mr. McCray ask if he could have a shower at that time? A. He had a shower.

Q. He had been given a shower, a delousing shower, isn't that correct? A. There wasn't any such thing as a delousing shower.

When he came over the first day, we didn't know about his prescriptions. The following day, the hospital sent over his prescriptions for a medical shower. He was getting medical showers frequently, at least once a day, or (264) something. If a day, he missed a medical shower because of something happening in the institution, we'd call him down and give him a medical shower, and he was also given his little plastic container to apply to his body when he got through showering.

Q. You're talking general terms, now, you're not talking about— A. About him, talking about him.

Q. You're not talking about that specific day? A. The second day he got a shower, he had defecated on himself.

Q. No, I'm talking about the day on which he was put into IC. A. The day he was put into IC, he didn't get a shower, not to my knowledge, he didn't.

(The Court) He didn't what?

(The Witness) He didn't get a shower, the day he was put into IC. The day he was put into IC, the same day he came into the south wing.

(The Court) Didn't he come in the south wing on the 17th?

(The Witness) I believe it was the 17th, I'm not positive, the date.

By Mr. Morgan:

Q. Well, Lt. Smith, the 17th was three days before the (265) 20th, and the 20th is the day he was put into IC, therefore, he couldn't have been put into IC the same day he came to the south wing, could he? A. What — sure, he could be put into IC the same day he come to south wing, but what day—

Q. That's not what happened to Mr. McCray. A. What day was that on, was that a Saturday?

Q. I don't know.

(The Court) Here it is, what day was it on, it says up top, doesn't it?

Let me see those exhibits.

(Handed.)

(Mr. Rosenthal) Your Honor please, I have a '71 calendar here.

(The Court) It is a Saturday, I know that.

(Mr. Rosenthal) Yes, sir, it was a Saturday.

(The Witness) Well, that explains itself.

Saturdays is one of the shower days for the whole wing, so every time a man gets a shower, especially IC, we document it. We document it for the purpose, if he refuses one and turns around Monday and makes a complaint that he didn't get one—

By Mr. Morgan:

Q. All right, do you normally work on Sundays, Sgt. Smith, — Lt. Smith? (266) A. Right.

Q. You do work Sundays? A. Right.

Q. During this period of time, were you working on Sundays? A. I don't recall.

Q. You just testified that you recall going in the IC area the very next day, which was a Sunday. A. The next day is Sunday.

This is why I asked you, was the next day a Sunday.

Q. Well, the 20th, Mr. Rosenthal tells us, was a— A. Now, wait a minute, you said he came in the wing on the 17th?

Q. It's your testimony, Sgt. Smith. A. I mean, you said this, I said the next day I called the psychologist. Now, whether it was Saturday, or Wednesday, or Thursday, I'm not sure.

Q. That would have been the day following the day he was put into IC? A. Correct.

Q. My question is, assuming that had been a Sunday, would you have been on duty that day? A. That particular Sunday, I don't know.

Q. Sgt. Smith, you testified that you went into the IC area the following day— (267) A. Listen—

Q. —and saw what you saw. Now, you're testifying that you don't recall whether you were on duty that day. A. Well, you listen.

If the day he came in the wing was a Saturday, I was working Sunday. If it had been a Thursday, I'm not positive I was working Sunday, or not.

Do you understand that?

Q. Is the isolated confinement area supervised by a correctional guard, officer? A. I explained to you earlier.

Q. How is it supervised? A. An officer that works back there in the storeroom, by the name of Hendricks, he's back there five days a week.

Q. Does he sit in that area all the time? A. He's in there, unless he's needed elsewhere.

Q. From where the guard post is in that particular area, can he see into all the cells? A. He's about 15 feet away from them.

Q. From each of the cells? A. The cells are all in front of him, he's facing them.

Q. He could see in Cell Number 5, couldn't he? A. He could see in Cell Number 5, 4, 3,—

Q. If an inmate was in Cell Number 5 doing bodily harm (268) to himself, Sgt. Hendricks could see that, couldn't he? A. Right, and then he has to check them every half hour, anyway.

Q. Are there any written regulations or policy, Sgt. Smith, that guide you when you put an inmate — or during this period of time, at least, that would have guided you when you put an inmate into isolated confinement concerning whether he was to receive a mattress, or not? A. I explained that to you once, but I'll do it again.

If an inmate is going to do some harm to himself, I remove the mattress.

If he's not attempting to do any bodily harm to himself, he gets a mattress when he goes in. Also, a pair of coveralls.

Q. Well, my question, Sgt. Smith, was whether or not there was any written policy or regulations at this period of time concerning— A. No, it's not a written regulation, you have to use your own judgment in a lot of incidents.

Q. From your own experience? A. Right.

Q. Was Mr. McCray, when he was put in isolated confinement, given any reading materials? A. When he was first put in, I didn't give him anything.

(269) Q. Is there any reason why he couldn't have had reading materials, in your judgment? A. Well, like I said, when I put him in the first time, I stripped him of everything because he was talking about doing bodily harm to himself, so that means he didn't get reading materials, books, pencils, or anything.

Q. From your experience in the institution, Sgt. Smith, have you ever had personal knowledge of an inmate doing bodily harm to himself with a book? A. No, but in my personal experience I've cut an inmate down that had hung himself by strips off a mattress, or sheets.

Q. But you never had that kind of occasion with regard to a book, have you? A. No.

Q. Was Mr. McCray given a blanket? A. Nothing, nothing.

Q. Did you testify, Lt. Smith, that Mr. McCray's clothing was removed before he was put into isolated confinement? A. You're playing games with me, I just explained—

Q. Well, I believe you testified on direct examination that his clothing was not removed. A. I told you, when I brought him down he was talking about doing bodily harm to himself. I stripped him, stripped, (270) that means no clothes.

Q. In the same deposition that I referred to before, Lt. Smith, on June 7, 1973, on pages 7 and 8, my question was, at the bottom of the page:

Did McCray have clothes on when you put him in?

Referring to IC.

Your Answer:

Right.

(Mr. Rosenthal) Objection, Your Honor, because it doesn't say, referring to IC, in the deposition.

(Mr. Morgan) Well, if we want to read back through the whole deposition, I think we can agree that that's what we were discussing.

Do you want to start back further?

(Mr. Rosenthal) Read the whole thing.

(Mr. Morgan) Well, we would have to begin back at the middle of Page 6.

(Mr. Rosenthal) Well, I think that's all right, if you continue 7 and 8, I think the Lieutenant explains himself.

(Mr. Morgan) All right, fine.

Beginning on Page 7. Okay.

Did McCray have clothes on when you put him in?

Answer, right.

Question, he did?

Answer, ahuh.

(271) Question, wasn't stripped?

Answer, no, at that time he wasn't stripped, he had a set of coveralls on.

Question, was he stripped later?

Now, I don't remember, I'm not for sure whether he was stripped later, or not.

By Mr. Morgan:

Q. Now, your testimony here today is that before you put him in the cell, he was stripped, because you felt he was to do bodily harm to himself? A. Right, and,

listen, when he first came in, when an inmate first comes in a segregated area, he automatically goes in IC, that's any inmate.

Q. No— A. Now, listen.

And then he's searched, he's stripped of all his institutional clothing and puts on a set of green coveralls and he goes on the tier.

Q. Yes. A. If I bring him back down to IC to be housed for some infraction that — or something he was going to do to himself, if I thought he was going to do some harm to himself, then I would strip him completely and leave him stripped.

Q. Yes. A. And I think that should answer that, too.

(272) Q. And that's what you did in Mr. McCray's case? A. Right.

Q. And what you said in your deposition was incorrect then? A. It seems to me like, when he first came in IC, he had clothes on, you understand, he came in, he had clothes on.

Q. After you brought him down from the tier, he had his coveralls on, right? A. Correct. On the tier he had his coveralls on.

Q. Right. A. Correct. And then when I put him back in IC for housing, he had nothing on.

Q. In your deposition, Sgt. Smith, at Page 8, you stated in answer to my question:

Wasn't stripped?

No, at that time, he wasn't stripped. He had a set of coveralls on.

Was he stripped later?

Now, I don't remember, I'm not for sure whether he was stripped later, or not. A. Well, I did strip him later, but when he first came there he wasn't stripped.

Q. In other words, your statement in your deposition, I'm not sure whether he was stripped later, or not— (273) A. And after think about what really

happened the following day, I remember him being stripped, and then the next day I came in he had a mattress, which Officer Green gave him on 4:00 to 12:00.

Q. Well, in any event, it's your best recollection at this point that when you put him in the IC cell, you stripped him before putting him in? A. The second time down, right.

(Mr. Morgan) Excuse me, Your Honor, could I have just a couple of seconds?

(The Court) Ahuh.

By Mr. Morgan:

Q. —Lt. Smith, I apologize, getting back to the keeping of records on the south wing.

If in this situation, and we will assume that you did since you testified to it, when you contacted Dr. Musk to come into the south wing area to talk to Mr. McCray, if you had made a record of that, where would that have been recorded? A. If I made a record, it would be in the log book, I'm not positive I made a record of that, or not.

Q. It would be in the IC log book, the south wing log book, or the— A. It would be in the south wing log book.

Q. As opposed to the south wing desk book? (274) A. Right.

But, usually, when he's done, he leaves a little notation to what to expect of the inmate, or watch him closely, or something like that, it would be somewhere in his log, I imagine.

Q. Would Dr. Musk also make a notation in any of the south wing or IC log books that he had been in the area to see a certain inmate? A. No. We take that ourselves.

Q. But, to your knowledge, Dr. Musk keeps his own log book? A. I imagine he does.

Q. Have you ever seen him writing? A. Well, he always carried a little pad, he didn't carry a log book around with him.

Q. I see.

(Mr. Morgan) The Plaintiff has no further questions of Defendant Smith.

Thank you, Lieutenant.

(Mr. Rosenthal) Your Honor, I just have one question.

REDIRECT EXAMINATION

By Mr. Rosenthal:

Q. I refer you, Lt. Smith, to your deposition, on Page 16.

(275) Earlier this morning, Mr. Morgan referred to the time that you would keep someone on isolation, and ask if you can remember saying this on Page 16, if someone was in the IC unit involuntarily, and then I'm quoting you, then I wouldn't give him more than three days, period. Most of the time I keep him overnight, period.

Is that correct? A. Right.

Q. And that was, basically, your testimony earlier today? A. Right.

(Mr. Rosenthal) I have no further questions, Your Honor.

(The Court) Is there any record around here that shows when McCray came into the south wing?

(Mr. Rosenthal) Yes, Your Honor, the base file.

(The Court) Sir?

(Mr. Rosenthal) The base file, Your Honor.

(The Court) All right, when does it show he came in there?

(Mr. Rosenthal) On November 17, he was — well, it says, work assignment was changed from school to segregation, and his cell from A-301 to D-232.

By Mr. Rosenthal:

Q. Would D-232 be in the south wing? (276) A. Ahuh.

(Mr. Rosenthal) And then on the 20th is the report of the stripping, or tearing of the mattress, which was made by, I think, Officer Greenwood.

(The Court) It shows he went on the south wing on November the 17th?

(Mr. Rosenthal) Apparently, Your Honor, yes.

(The Court) Are there any other records in there pertinent to this situation that we're discussing now?

(Mr. Morgan) Regarding this date?

(The Court) Either the date, or the incident, other than what has been related? You people went through that.

(Mr. Rosenthal) We haven't seen anything relating to the incident itself, Your Honor.

(Mr. Morgan) Your Honor, in discovery, we requested all the files that are concerned here and we thoroughly reviewed them all and we could find no records of Mr. McCray being put into IC, nor can we find any records of why he was—

(The Court) No record of his being what?

(Mr. Morgan) We have no — we find no record, other than what we've introduced in evidence, and I think we have three pieces of documents, that indicate that he was in the isolated confinement area.

(277) We have disciplinary report records introduced into evidence which indicate that he tore his mattress during that period of time.

We have no disciplinary report on the — nor is there a disciplinary report on the initial disturbance that Mr. McCray was allegedly causing on south wing prior to his being put in isolated confinement.

Similarly, there are no records that we've been able to discover in the files that were given to us concerning the matter of his being visited by Dr. Musk, or his having destroyed his cell with his own defecation.

(The Court) All right.

(The Clerk) That's all.

(Mr. Rosenthal) Step down.

* * * * * *

(329) PROCEEDINGS OF JUNE 13, 1973

(The Court) Good morning.

(Mr. Morgan) Your Honor, I think the first matter we should deal with is the rebuttal testimony, which should be very brief, in the case of McCray versus Lt. Smith, and in rebuttal we have today Mr. Musk, the psychologist from the Penitentiary, Officer Hendricks from the Penitentiary, and also, very briefly, we would hear from the Plaintiff himself, Mr. McCray.

(The Court) All right.

What is that number again?

72, what?

(The Clerk) 234.

(Mr. Morgan) 234, Your Honor.

(The Court) 72-234?

(The Clerk) Yes, sir.

(The Court) All right.

(Mr. Morgan) We would call Mr. Musk as our first witness in rebuttal.

HENRY MUSK,

was called as a witness for and on behalf of the Plaintiff, and, having been first duly sworn, testified as follows:

(The Clerk) State your name.

(The Witness) Henry Musk. M-u-s-k.

DIRECT EXAMINATION

By Mr. Morgan:

Q. Mr. Musk, you have been called to testify this morning as a rebuttal witness on behalf of the Plaintiff, Milton McCray, in this case.

(Mr. Morgan) Your Honor, I might add that Mr. Rosenthal and I have agreed that I can present the facts of what is going on in the case before Mr. Musk so that he will be aware of it and it will probably save some time that way.

(The Court) Very well.

By Mr. Morgan:

Q. Mr. Musk, yesterday in this case, there was testimony to the effect that on November 20th, 1971, Milton McCray, the Plaintiff, was housed in the segregation section of the south wing at the Penitentiary.

On that same day, November 20, 1971, the Plaintiff was moved from the segregation section into the isolated confinement section, Cell Number 5.

(331) There was also testimony that on November 21st of 1971, Mr. McCray was viewed in a cell in the isolated confinement area, having defecated into a cup and spread feces on the wall of his cell.

There was further testimony that you, Mr. Musk, were called by south wing officers in response to having seen that and asked to interview Mr. McCray.

Our questions to you this morning, and, first of all, are you familiar with the Plaintiff, Mr. McCray? A. Yes.

Q. Have you had an opportunity to talk to him in the past? A. Yes.

Q. Do you recall on what occasions you've talked to Mr. McCray? A. I talked to him on many occasions, sometimes in the south wing, sometimes in the south wing annex, which was an in-patient treatment area in the Penitentiary, and sometimes privately and sometimes with the consulting psychiatrist.

Q. What was your position at the Penitentiary, Mr. Musk? A. I'm no longer at the Penitentiary, I'm Psychologist One Correctional at the Women's Institution.

From March '71 to March '73, I was a Psychologist One.

(332) (The Court) You were what?

Speak up, please.

(The Witness) A Psychologist One Correctional at the Maryland Penitentiary.

(The Court) March '71 to when?

(The Witness) March '73.

(The Court) You were a psychologist, what?

(The Witness) One Correctional, that's the classification.

By Mr. Morgan:

Q. Mr. Musk, if you recall, at any time, either on November 21st of 1971, or shortly thereafter, did you have occasion to talk to Milton McCray? A. In the written notes that I have—

Q. Perhaps you can describe what you have on your lap there to the Court. A. This is a file which contains psychiatric reports, psychological testing, a list of the various medications that Mr. McCray has been on, a list of various appointments with other doctors.

Q. Is that the file in which you would keep reports of interviews with Mr. McCray? A. Yes.

The first note I see that I have written down is dated 10/24/71, and the note after that is May 24th, 1972.

(333) Q. Do either of the notes in that case indicate that the subject of your conversation with Mr. McCray had to deal with defecation? A. No.

Q. Do you recall talking to Mr. McCray at any time in the isolated confinement area? A. Yes.

Q. Do you recall whether those conversations — do you recall the dates of those conversations? A. No.

Q. Do you recall specifically in November, or the early part of December, of 1971, talking to Mr. McCray in the isolated confinement area concerning defecation in his cell? A. No.

Q. Had such a conversation occurred, would you have made notes of that conversation? A. Most probably.

Q. If you had made notes, would those notes have been in his file? A. They should be.

Q. Do you have any personal recollection, other than what's in the file, of having discussed with Mr. McCray at any time the matter of his defecation in a cell? A. In his cell at Patuxent, but not in his cell at the Penitentiary.

(334) Q. Do you recall in any of your conversations with Mr. McCray, talking with Mr. McCray about defecating in a cell at the Penitentiary? A. No.

Q. Do you recall visiting Mr. McCray in late November or late December in the isolated confinement area? A. No.

Q. Is there anything in the records before you that indicate that such a visit was made? A. No.

The only — the note of 10/24/71, I was asked to see Mr. McCray on 10/22/71, I called for him twice on 10/23/71, and went to the west wing, but he couldn't be found, and I said that he will be seen if he requests an appointment in the future.

Q. That was in October of '71? A. Ahuh.

Q. Do you recall on or about November 21st, 1971, your having been contacted by Sgt. Smith of the south wing? A. In that month, I'm sure that I was.

Q. Do you know Sgt. Smith? A. Yes.

Q. Do you recall being contacted by Sgt. Smith on or about November 21st, 1971, concerning Milton McCray? A. No.

(335) That doesn't mean it didn't happen. I just don't remember.

Q. Is there anything in your records that indicates that occurred? A. No.

(Mr. Morgan) We have no further questions.

Thank you, Mr. Musk.

CROSS EXAMINATION

By Mr. Rosenthal:

Q. Mr. Musk, when counsel, Mr. Morgan, asked, do you recall, your answer was no, you are referring to the fact that you do not recall, rather than the fact that you were not asked to do something? A. Right.

Q. So, as a matter of fact, it is possible that these things took place, but because of the time element, you just do not recall? A. That's correct.

Q. All right.

Now, every time you would be called to speak to Mr. McCray, or to any inmate, would that request definitely go into the file that is kept, such as you have in your hand? A. No.

(336) Q. Do you recall approximately how many times you may have seen Mr. McCray on the south wing, that's if you recall? A. At least 10.

Q. At least 10 times? A. Ahuh.

Q. And the file in front of you would reflect how many times, if it does so reflect? A. I don't think there is one note that indicates that I saw him in the south wing.

There isn't.

(The Court) What did you say now?

(The Witness) Pardon?

(The Court) I didn't understand your answer.

(The Witness) I saw Mr. McCray at least 10 times over the period of time that I was employed at the Penitentiary in the south wing, but there is no note of those meetings in this file.

(Mr. Rosenthal) I have no further questions, Your Honor.

REDIRECT EXAMINATION

By Mr. Morgan:

Q. Just one other question, Mr. Musk.

In response to Mr. Rosenthal's question that you have seen men on south wing, and that, in particular,

you've (337) seen Mr. McCray 10 times on south wing, what exactly do you mean by having seen men on — or Mr. McCray on south wing? A. There were two occasions that I remember specifically, and concerning each of these occasions I saw him a couple of times.

One was he was in the isolation area because of an incident involved with a ring.

(The Court) Involved with what?

(The Witness) A ring, a missing ring.

And I saw him a couple of times on that, for that reason; and the second time that I remember was after his cell had caught on fire, I saw him back in the isolation area a couple of times.

By Mr. Morgan:

Q. Do you recall any other specific instances when you saw Mr. McCray on south wing? A. Those are the only two I can clearly remember right now.

Q. So, of the 10 or so times that you saw him, approximately four you can account for, perhaps six you can't account for.

On those occasions, was your conversation with Mr. McCray in the nature of a psychological examination? A. No.

(338) Q. Could you describe what the nature of your conversation was? A. As regards the ring, Mr. McCray told me that he felt he was — he said that he had been taken to the Captain's office, a ring of his was missing, he had been taken to the Captain's office, and I think he said the Captain asked him if he was accusing one of his officers of taking the ring, and I think Mr. McCray said that he did, and then Mr. McCray said the Captain put him in the isolation area.

And I said, well, this is a disciplinary matter, I can talk to the Captain about it.

I went to the Captain, the Captain told me this is what had happened.

Q. Mr. Musk, I believe you testified that you had knowledge of Mr. McCray's record at Patuxent Institution of having defecated in his cell? A. Yes.

Q. Was it also your testimony that you have no knowledge, personal or otherwise, of his having defecated in his cell at the Penitentiary? A. I can't remember if he had, that doesn't mean it didn't happen, but I don't remember.

(Mr. Morgan) Fine, thank you, sir.

(339) (The Court) In view of his talking to McCray after the cell fire, don't you think he better stay around, to see what he knows about that?

(Mr. Morgan) Your Honor, we didn't specifically intend to call Mr. Musk in connection with that. I do recall a report in the materials we discovered, and I can't recall whether it would be particularly helpful, one way or another.

(The Court) Well, if you can, maybe you better stay here; and take his testimony in that connection, after we get through, okay?

(Mr. Morgan) Fine.

Perhaps we could take a brief recess after this and Mr. Rosenthal and I could talk to him and if he has relevant testimony we could take it today.

(The Court) All right.

(Mr. Morgan) Officer Hendricks, would you take the stand, please?

JAMES A. HENDRICKS,

was called as a witness for and on behalf of the Plaintiff, and, having been first duly sworn, testified as follows:

(The Clerk) State your name, please.

(The Witness) James A. Hendricks.

H-e-n-d-r-i-c-k-s.

(The Clerk) Thank you.

(340) DIRECT EXAMINATION

By Mr. Morgan:

Q. Officer Hendricks, where are you presently employed? A. Maryland State Penitentiary.

Q. Were you employed at the Penitentiary in the month of November, 1971? A. Yes.

Q. Do you recall what your duty assignment was at that time? A. No, I don't.

Q. Do you recall what your duty assignment was on November 21st, 1971, specifically? A. No.

Q. Have you ever been — has your duty assignment ever been south wing? A. Yes.

Q. Could it have been south wing during that period of time? A. It's possible.

Q. Do you know Lt. Smith? A. Yes.

Q. Then Sgt. Smith? A. Right.

Q. By way of introduction, Officer Hendricks, as I explained to Mr. Musk, the testimony in this case concerns (341) Mr. McCray having been removed from his cell in south wing and placed in an isolated confinement cell on November 20, 1971.

There is also testimony in this case that on November 21st, 1971, Mr. McCray was viewed in his cell by Correctional Officers, his cell — he having defecated in his cell and he having spread feces on the wall of his cell.

My question to you is, do you recall on November 21st, 1971, your having been in the isolated confinement cell area and having viewed Mr. McCray in an isolated confinement cell, Mr. McCray having defecated and having spread feces on the wall of his cell? A. No, I can't recall.

Q. Do you recall at any time in your career at the Penitentiary of having been in the isolated confinement area at a time when Mr. McCray was in one of the isolated confinement cells, when you viewed feces spread on the walls of his cell? A. No.

Q. Do you know Mr. McCray? A. Yes, sir.

Q. Did you know Mr. McCray in November of 1971? A. Yes, sir.

(Mr. Morgan) Thank you, Officer Hendricks, I have (342) no other questions.

(The Witness) Okay.

(Mr. Rosenthal) I have no questions, Your Honor.

(The Court) All right.

(Mr. Morgan) Your Honor, I would ask the Plaintiff, Mr. McCray, to take the stand for a brief series of questions in rebuttal.

(The Court) Very well.

(Mr. Rosenthal) Your Honor, may Officer Hendricks be excused?

(The Court) Yes.

MILTON McCRAY,

the Plaintiff, resumed the witness stand, and, having been previously duly sworn, testified further, as follows:

(The Clerk) Just be seated, Mr. McCray, you are still under oath.

Milton McCray.

DIRECT EXAMINATION

By Mr. Morgan:

Q. Mr. McCray, you testified on direct examination, I believe, that on November 20th, 1971, you were removed from your cell in south wing and placed in the isolated confinement area, is that correct? (343) A. Yes.

Q. Now, in connection with that move from south wing to isolated confinement — well, first, let me ask you this question.

Were you familiar at that time with the disciplinary procedures at the Maryland Penitentiary? A. Yes.

Q. Adjustment team procedures? A. Yes.

Q. Were you familiar with adjustment notices of offenses? A. Yes.

Q. Did you at any time receive a notice of offense for creating a disturbance in south wing on November 20th of 1971? A. Absolutely not, no.

Q. All right.

Now, did you at any time receive a disciplinary or adjustment hearing— A. No.

Q. —for a charge of creating a disturbance on November 20th, 1971, in south wing? A. None at all.

Q. Did you receive such a hearing — well, I withdraw that question. (344) A. If you're speaking of the incident concerning the defection in the cell, I have known inmates to have been involved in such activity in the Penitentiary, and they definitely received disciplinary—

(Mr. Rosenthal) I object, Your Honor, and ask it be stricken.

I don't think that, number one, it's responsive to the question of counsel, and number two, involving other inmates, I don't think also would be relevant to the question of Mr. McCray in this particular case.

(Mr. Morgan) Your Honor, my question to Mr. McCray was directed only to the incident of his creating a disturbance on south wing.

(The Court) Yes, it was.

Objection sustained.

(Mr. Morgan) My question didn't go to the incident in isolated confinement.

(The Court) All right.

By Mr. Morgan:

Q. Mr. McCray, on November 20th, 1971, when you were in your cell in segregation, you heard the testimony of Officer Smith that he came to your cell, do you recall at that time indicating to Officer Smith that you intended to do bodily harm to yourself? A. No. The only statements made to Sgt. Smith was in (345)

reference to my medication, my medicated showers, and receiving my law books as the Warden had prescribed and ordered at that particular time.

Q. Did you at that time threaten to do bodily harm to yourself? A. No, I had no reason, no.

Q. Prior to your having been taken to isolated confinement, Mr. McCray, did you tear the locker of your cell off the wall? A. No, that's impossible for me to tear one of those lockers off the wall.

Q. Did you tear up the mattress in your cell on south wing? A. No, I didn't.

If I did, I'm quite sure I would have got a disciplinary order for it.

Q. Mr. McCray, you testified yesterday, I believe, that when you were first put on south wing you were put on the street side and you were only there briefly because that cell had lice in it, is that correct? A. Yes.

Q. And you also testified, I believe, that you were removed from that cell and taken to the yard side? A. No, I was taken to the hole area.

Q. Well, after — well, I believe you testified that (346) you were removed from the cell because it had lice, is that correct? A. Right, and taken to the hole area.

Q. And held in the hole area? A. I was held there until I saw the Warden coming through and I explained that I was taken out of the cell with lice in it.

Q. Yes. A. And I had requested showers and some type of delicing, and powder, whatever. The result of it, I received no response from any of the officers that I requested this request, and he inquired into it and the officers did verify that I was in a cell that was supposed to have had someone in there that had lice and I was — the Warden, in turn, ordered that — I explained about the law books also, and he, in turn, ordered that I be taken out of the cell, given a shower, placed on south wing, and given my law books.

That's when, I think two days later or a day later, I insisted that I have my law books and the showers from

then on, and that resulted in me being taken out of the cell, into the hole, and Sgt. Smith subsequently threw water on me as a result of his dislike for me, and I don't know what his reasons was—

Q. Mr. McCray, just so we can get the sequence of events clear for the record, is it your testimony that when you (347) came on south wing initially, you were placed in a cell on the street side, the cell on the street side had lice in it, as a result you were removed from that cell and held briefly in the isolated confinement area— A. Yes.

Q. —you were then moved up to—

(Mr. Rosenthal) Your Honor please, I think the witness should testify rather than counsel summarizing.

(The Court) Well, all he's doing is summarizing what McCray said.

(Mr. Rosenthal) All right.

By Mr. Morgan:

Q. I believe you then testified that after being held briefly in isolated confinement area, you were removed to a cell on the yard side, and then on November 20th were moved to isolated confinement area again? A. Yes.

Q. For the period of time that is the subject of this case? A. That is correct.

Q. Is all that correct? A. Correct.

Q. Each of those four or five incidents is correct? A. Yes, it is.

Q. All right.

(348) Now, Mr. McCray, I believe you testified on direct and Officer Smith testified also that on November 20th you were yelling out of your cell— A. Yes.

Q. —is that correct? A. Yes, I was.

(The Court) Wait a minute.

You were yelling out of the cell, that's when you were moved to the yard side?

(The Witness) Yes, when I was taken out of the hole as a result of the orders of the Warden, after the shower.

(The Court) All right, and then what were you yelling about?

(The Witness) I was yelling to receive the law books that I had heard personally that the Warden — from the Warden, the Assistant Warden, that I should be given, and Sgt. Smith refused to give them to me.

(The Court) And you were yelling?

(The Witness) I was yelling to get them up there so that I could get the books. As a matter of fact, I would sit down and talk to officers passing by, giving them details of why I should have these law books and why I was so anxious to get them, and it seemed that all these requests didn't avail anything, so I just continued calling, hoping that someone would come along that would be able to give them to me in (349) compliance with the Warden's orders.

(The Court) Were you calling loudly?

(The Witness) Yes. I was calling loud enough for the officers to hear.

There was no officer patroling the tier, so I had to call out to attract the officers' attention.

By Mr. Morgan:

Q. Do you recall which tier you were on at that time, Mr. McCray? A. Four, four.

Q. Where were the officers whose attention you were trying to attract? A. They were at the desk on flats, on the opposite side.

Q. How far down from your cell is the flats? A. It's about four stories.

Q. Four stories, and how far across, horizontally, from directly beneath your cell on the flats to the officers' desk is it, approximately? A. About the length of this courtroom, I assume, or a little more.

Q. Mr. McCray, besides yelling out of your cell, were you making noise of any other kind? A. Oh, no, just calling Sgt. Smith, I was calling him direct.

Q. Now, Mr. McCray, directing your attention to the (350) following day, November 21st, 1971, your testimony was, I believe, that you were at that point in isolated confinement in Cell Number 5, is that right? A. Yes.

Q. Now, did you see Sgt. Smith on that day? A. On which day was that?

Q. The 21st. A. I don't recall seeing Sgt. Smith on that day.

Q. Did you see Officer Hendricks on that day? A. No, I didn't.

Q. Did you see Mr. Musk on that day? A. No.

Q. Do you know Mr. Musk? A. Yes, very well.

Q. Do you know Officer Hendricks? A. Yes.

Q. Mr. McCray, at any time during the period from November 20th to November 22nd, when I believe you and also Sgt. Smith have testified you were in isolated confinement, did you defecate into a cup? A. No, I did not.

Q. At any time during that two-day period, did you spread feces on the wall of your cell? A. No, I did not.

Q. At any time during that two-day period were you (351) removed from your cell and put into another cell? A. No, I wasn't.

Q. At any time during the two-day period were you given a shower? A. During the two-day period?

Q. Yes. A. No.

Q. Mr. McCray, Sgt. Smith testified yesterday that at times you have been in isolated confinement voluntarily, is that correct? A. Yes.

Q. Could you explain to the Court under what circumstances you requested and when you requested that you be placed in isolated confinement? A. Well, I was in the south wing area and—

Q. Can you recall — excuse me, do you recall when this was in point of time? A. Not exactly.

I know that I was assigned to south wing area for some violation of the institution's rules, and the tiers are quite loud because all the inmates are hollering and screaming from one end to the other, and I like to be quiet, where I can be quiet and study, and the hole is the closest thing to that, plus being in the hole I had an opportunity to get my law books, and other things, and talk to officials that came (352) through that area, that would give me consideration that I couldn't get on the tiers.

So, I felt that of the two worst, being in the south wing or being in the hole, at that particular time, it would be much better for me since I had more in the hole at this particular time, permit me more in the hole, I considered being there would be more beneficial to me all around. Not so much that I like it there, but the south wing was the south wing.

Q. Mr. McCray, during those times you were in the hole voluntarily, did you have your clothes? A. Oh yes, I had more comforts in the hole at this time that I'm referring to, voluntarily there, than I had on south wing.

As a matter of fact, in the hole I had my prison state clothes, I mean, in the hole I had these, on the south wing I just had my jump suit, and I had more access to the tier runner to do little favors for me as far as giving me items that I couldn't get on the tier.

Q. Did you have a mattress on that occasion? A. I had a mattress.

Q. Did you have your personal belongings with you? A. Oh yes, just about everything I had in my cell on the tier, I had in the hole.

Q. Was the cell that you were in voluntarily the same or (353) —was it the same — on the occasion you were in the cell voluntarily, was it the same cell that you were in? A. Oh, no, it was a much better cell because I had all my personal property, it was much more convenient.

(Mr. Morgan) Fine.

I have no other questions of Mr. McCray.

Thank you.

CROSS EXAMINATION

By Mr. Rosenthal:

Q. Mr. McCray, if my memory serves me correctly, you testified on Monday, or yesterday, in reference to this case that at the time you were yelling loudly to attract attention that there were no other inmates on the south wing yelling? A. There weren't.

Q. There weren't, is that correct? A. There weren't.

Q. And now today, you testified the reason that you voluntarily asked to be placed in IC was because of the disturbance of the other inmates, always loud noises and talking? A. Yes.

Q. Now, when you just testified that this particular cell, when you were placed — voluntarily asked to be placed in IC, was a much better cell than Number 5, was that the understanding that— (354) A. Yes.

Q. Now, what cell were you in? A. I was in Number 1.

Q. Number. 1.

And why is this a much better cell? A. If you're talking about the physical—

Q. Yes. A. —aspect of the cell, it was no different, except for the fact that in the Cell Number 5, I had no clothes, no mattress.

Q. I'm talking about the physical features of Cell 1 as against the physical features of Cell 5. A. There's no difference in physical features.

Q. Right. A. Except I had all my property in that cell, my books, my clothing, my mattress, I had a blanket, I had a sheet, they gave me all of the things that I could have had in the south wing area, and I had personally cleaned the cell myself and made it comfortable for me to live in.

(Mr. Rosenthal) No further questions, Your Honor.

(Mr. Morgan) Unless Your Honor has some questions of Mr. McCray, we have nothing further.

(The Court) Not right now.

(Mr. Morgan) All right, you may step down, Mr. McCray.

* * * * * *

(381) (The Court) All right.

Now, what about — that leave only one case, and that is the Burrell case.

(Mr. Morgan) The Burrell case, which will begin at 10:00 o'clock tomorrow morning.

(382) (The Court) All right.

Now, however, Mr. Musk, apparently, knows something about it, should we take his testimony today?

(Mr. Morgan) Well, Your Honor, I think if we could have just a very brief recess, Mr. Rosenthal and I could talk to Mr. Musk and see.

(The Court) All right, let's do that, see what you want to do about it.

(At the conclusion of a short recess, the following proceedings were had:)

(The Court) All right.

Now, let's see, now, Counsel in this matter, you understand that the case is going on tomorrow, but inasmuch as — in order to save time, I assume you will agree, Mr. Morgan, we might as well take Dr. Musk at this time, right?

(Mr. Morgan) Yes, Your Honor.

Mr. Musk will be the Defendant's witness.

(The Clerk) That's Civil Action 72-68-N, Milton McCray — that will be amended to read, Captain Burrell, is that correct?

(Mr. Morgan) That's right.

(The Clerk) All right.

(383) HENRY MUSK,

resumed the witness stand, and, having been previously duly sworn, testified further, as follows:

(The Clerk) Mr. Musk you have been sworn previously this morning, you are still under oath.

That's Henry Musk.

DIRECT EXAMINATION

By Mr. Rosenthal:

Q. Now, Mr. Musk, you testified previously that you do, in fact, know the Plaintiff, Milton McCray? A. Yes.

Q. And are you familiar with the time in January of 1972 when Mr. McCray's mattress was afire? A. Yes.

Q. Do you remember the next time that you saw Mr. McCray after that fire?

(The Court) Wait a minute.

Familiar that his mattress was — January, what was it?

(Mr. Rosenthal) January 1, 1972, Your Honor, I'm sorry.

(The Court) All right.

By Mr. Rosenthal:

Q. Do you remember the time that you saw him thereafter? (384) A. I don't remember the day, I remember seeing him in the isolation area.

Q. Do you remember approximately how long aftwards this might have been? A. No.

Q. Now, for the record, I have never discussed this matter with you at any time, is that correct, other than just now in the presence of Mr. Morgan? A. Right.

Q. And would you please state for the record, or describe the physical condition of Mr. McCray at this time? A. The one thing that sticks out in my mind was on his forehead, it was either — I'm no doctor, but it either looked like an abrasion or a burn. In any event, the color of the skin was lighter there than on the rest of his face, so something was missing.

Q. And correct me if I'm incorrect, I think that you characterized this condition in front of Mr. Morgan and myself as a possible scrape? A. It could be, it could have been a burn, I don't know.

Q. All right.

Now, I show you if I may, from the file that you were using this morning, which is Mr. McCray's file pertaining to what? (385) A. Psychiatric and psychological records.

Q. And I show you a report dated June 20th, 1972, that we have, when I say we, you, Mr. Morgan and I have discussed, is that correct?

(The Court) June what?

(Mr. Rosenthal) The 20th, 1972, Your Honor.

(The Court) Ahuh.

By Mr. Rosenthal:

Q. You are familiar with this report? A. Yes.

Q. And it is initialed by whom? A. Dr. B. D. Smith, consulting psychiatrist.

Q. And you were present at the time of the interview with Mr. McCray which resulted in this report, is that correct? A. Yes.

Q. All right.

(Mr. Rosenthal) Your Honor please, we would ask that this be admitted into evidence as an exhibit, and we would also request that we have permission to photostat the same and furnish counsel for the Plaintiff with a copy and then introduce a photostatic copy rather than the records of the Penitentiary.

(Mr. Morgan) Your Honor, the Plaintiff has an objection to the admission of this report on the grounds of rele- (386) vancy.

This is — purports to be a, I believe this to be an accurate characterization of it, a three or four paragraph statement of what occurred at an interview where Mr. McCray, Mr. Musk, and Dr. Smith were present.

It's signed by Dr. Smith and states in the text that Mr. Musk was present.

The report was — not a report, really, just a statement of an interview — was dated June 20th, 1972, and although we haven't heard any evidence in this case, the only period of time of any relevance as far as the Plaintiff is concerned is that period of time between January 1, 1972 and January 3, 1972.

I would — I see no relevance that this statement of interview has to the case. Perhaps if Mr. Rosenthal could proffer the relevance and in some way tie it in to what his proposed defense is, then my objection would not be valid.

(Mr. Rosenthal) If Your Honor please, I think that the objection, if anything, would go to the weight of the evidence, rather than to the admissiblity itself.

I think it would be unfair to either party to introduce just a portion of the record, and there is a portion in this report pertaining to the fire which took place on January 1, 1972, which is one of the bases upon which the Plaintiff relies for his cause of damages.

(387) So, we would admit that it is relevant.

(The Court) All right, I will admit it, and I will give it such weight as it deserves, under the circumstances, considering the lateness of the report.

(Mr. Rosenthal) Thank you, Your Honor.

We would have no further questions of Mr. Musk.

(The Court) Well, what are you going—

(Mr. Rosenthal) I'm sorry.

(The Clerk) When you get the copies, I'll mark them.

(The Court) Let me look at it.

Have you seen it, Mr. Morgan, do you see anything in there pertaining to the fire?

(Mr. Morgan) Yes, Your Honor, there is one sentence pertaining to the fire.

(The Court) Let me see it.

(Handed.)

(Mr. Morgan) The sentence pertaining to the fire is in the final paragraph on the first page, Your Honor, and our position would be that the statement made there is merely what will turn out to be a cumulative statement.

(The Court) It doesn't really say anything, Mr. Morgan. I don't think it makes any difference at all, as you say.

I'll let it in, but it has very little weight as far (388) as this Court is concerned.

CROSS EXAMINATION

By Mr. Morgan:

Q. Mr. Musk, just a couple of questions.

Is it possible for you to place any more closely in time the incident you described where you had seen Mr. McCray in the isolated confinement area? A. I presume it was the week of January 4th, that was when I came back, I think, from holiday.

Q. Do you recall how you happened to see him? A. At that time, it was one of my duties to go regularly to the south wing and I was particularly interested in the people that were in the isolated area, as to why they were there.

(The Court) You say it was just after January 1st?

(The Witness) 4th.

(The Court) What?

(The Witness) 4th.

(The Court) And you had to go to the isolation area, what, once a—

(The Witness) Usually once a week.

By Mr. Morgan:

Q. And Mr. McCray just happened to be one of the residents that day and, as a result, you talked to him? A. Yes.

(389) Q. Did Mr. McCray say anything to you during the conversation? A. He complained about his medical treatment.

Q. Specifically, what complaint? A. That he wasn't getting the treatment, the proper treatment, he felt he wasn't being properly treated.

Q. Did he specify that? A. Yes.

Q. What did he mean by proper treatment, did he say what he meant by proper treatment? A. I think he said he hadn't seen a doctor.

Q. Did he say why he wanted to see a doctor? A. Because of the fire that he had been in and he didn't feel right.

Q. Did he say specifically how he didn't feel right? A. He was concerned about the condition of his skin.

Q. Did he say specifically anything about the mark that you referred to on his forehead? A. Not that I can remember.

Q. Did he say that that mark had been caused by the fire? A. This was — the mark on his head was my own impression, I did not discuss specifically any injury that was involved, just the part that I remember when I saw him.

Q. Could you describe it in more detail, first, how (390) large was it? A. Larger — about the size of a silver dollar, I guess.

Q. And where on his forehead was it? A. I think it was here, over the right eye.

Q. And I believe you testified that it was a lighter area than the rest of his face? A. Yes.

Q. Did it appear to be wet? A. It may have been, I don't remember.

Q. Did it appear to have a scab on it? A. No.

(The Court) What?

(The Witness) No.

By Mr. Morgan:

Q. Did it appear to be an open wound or — did it appear to be an open wound? A. Fresh.

Q. You testified, I believe, that you're not a doctor? A. Right.

Q. And that it was your impression as you viewed this wound that it could have been a scrape, or it could have been caused by fire, is that right? A. Or something else, I don't know. All I know, you know, it was there.

(391) Q. Did it appear it could have been caused by a blow to the head? A. I wouldn't know, I suppose, but I don't know.

Q. Did Mr. McCray have any other complaints to you concerning his health while you were talking to him? A. I think he complained about difficulty in breathing.

Q. Do you recall specifically what he said about that? A. No, just the complaint.

Q. What, if anything, did you do, Mr. Musk, in response to his request for medication, medical treatment? A. I informed the nurse, which is usual procedure, she then informs the doctor.

Q. Do you have any personal knowledge that she informed the doctor? A. No.

Q. Did you inform the nurse personally or— A. Personally.

Q. Personally? A. Yes.

Q. That same day? A. Yes.

Q. Do you recall the nurse's name? A. No.

Q. Would it have been Nurse Webber? A. It could have been Nurse Webber, or it could have (392) been Nurse MacKensie, either of those two.

Q. The conservation that you had with Mr. McCray in the presence of Dr. Smith on June 20th, which is the subject of the report introduced as evidence, what was your role during that conversation? A. More as an observer.

Q. Was the report written by Dr. Smith? A. Yes.

Q. Are the conclusions that are drawn in the report Dr. Smith's conclusions? A. Yes.

Q. The statements made by Mr. McCray in the report are Dr. Smith's paraphrasing of those statements? A. Yes.

Q. There was no recording made of this interview, I assume? A. No.

Q. Do you recall how long after the interview the statement was made, Dr. Smith's statement; do you know how long after the interview Dr. Smith's report was written? A. Oh, his usual procedure is to — I don't know if it was a Tuesday or a Thursday, a:.yway, but he goes home, he has a dictating machine at home and sometime during that week he dictates the reports usually.

Q. Did you talk to Mr. McCray at any other time (393) between January 4th, or shortly thereafter, and June 20th? A. Probably, but I don't remember.

(Mr. Morgan) Fine.

Thank you, Mr. Musk.

(Mr. Rosenthal) Mr. Musk may be excused, I believe, Your Honor?

(The Court) Yes, sir.

(Mr. Rosenthal) Thank you very much.

(The Court) All right.

Now, tomorrow we start out with the Burrell case, and, let's see, what time was the doctor coming?

(Mr. Morgan) The doctor will be here at 2:00 o'clock, Your Honor.

(The Court) All right.

Well, how much testimony have you got, how many people have you got coming in on this case?

(Mr. Morgan) Your Honor, I just have Mr. McCray to testify and Dr. Gould on his behalf.

(The Court) And what have you got?

(Mr. Rosenthal) We will have Mr. Burrell, Nurse Webber, and as far as I know at the present time, Your Honor, that's all.

Now, both of them will be here at 10:00 o'clock so that if the doctor is not here, if Your Honor does not mind (394) taking the testimony as we have in these cases out of order, then we can put on our case subject to any rebuttal after Dr. Gould testifies.

(The Court) All right.

Is that agreeable?

(Mr. Morgan) Well, I think the Plaintiff ought to testify first.

(Mr. Rosenthal) Yes, I mean after the Plaintiff testifies—

(The Court) Sure.

(Mr. Rosenthal) —but assume that the Plaintiff will not go through till 1:00 o'clock, we would be prepared to put on our witnesses and then have Dr. Gould testify when he gets here at 2:00.

(The Court) All right?

(Mr. Morgan) That's fine, Your Honor.

(The Court) All right.

(Whereupon, at 12:15 o'clock p.m., an adjournment was taken until Thursday, June 14, 1973, at 10:00 o'clock a.m.)

* * * * * *

(397) PROCEEDINGS OF JUNE 14, 1973

(The Court) Good morning.

Do you have your amended complaint?

(Mr. Morgan) Your Honor, I'm sorry, I don't, and I apologize for that, the reason is that I only have one copy of that complaint and somehow it got misplaced. I haven't had a chance to ask Mr. McCray, but possibly he picked up my copy last might and he has it in his file over here, but the only changes will be as we discussed and I should be able to have it by this afternoon, if not, certainly, tomorrow, but there won't be any surprises from our standpoint, we will abide by the agreement, agreed amendments.

(The Court) Be sure to get it in, Counsellor, will you?

(Mr. Morgan) Yes, sir, I surely will. We would have had it today, but we misplaced it.

(Mr. Rosenthal) Preliminary, Your Honor, we have the report of June 20th, 1972, which is one of the exhibits mentioned yesterday.

(The Clerk) That's in this case, Burrell?

(Mr. Rosenthal) That's correct.

(The Clerk) That will be Defendant's Exhibit Number 1.

(Document was marked Defendant's Exhibit No. 1.)

(398) (The Court) All right.

(Mr. Morgan) Your Honor, this is Civil Number 72-68-N, which is Milton McCray, Plaintiff, versus Robert Burrell, Defendant.

The substance of this case, Your Honor, is very simple, the facts are very simple, in any case.

Mr. McCray was a prisoner at the Maryland Penitentiary on January 1st, 1972, when there was a fairly serious fire that occurred in his cell on south wing. He was removed from his cell and upon the orders of the Defendant in this case, we believe, was removed to the hospital area of the Penitentiary, and particularly that area of the hospital known as mental observation, which are isolated confinement cells of the nature which Mr. McCray will describe in his testimony.

Generally, the cells are completely barren with nothing in them except for a hole in the floor and into these cells Mr. McCray was placed without any clothes for three days, during that time he never left the cell, and he had nothing in the cell with him during that entire period of time.

He did suffer serious burns as a result of the fire.

And we would show, first, that Mr. McCray was placed by the Defendant into the cell without any semblance of procedural due process, without any justification on the (399) part of the Defendant.

The Defendant had knowledge that Mr. McCray suffered burns and was seriously injured, yet without any assurance that Mr. McCray would receive medical attention while he was in, put him on MO, mental observation, nor any assurance that Mr. McCray receive any psychological or psychiatric assistance or attention while he was in mental observation.

Now, the basis of our claim, in addition to the Fourteenth Amendment, is the Eighth Amendment, and that is that the very conditions of the cell itself are cruel and unusual punishment. Not only is the cell significant punishment to justify a claim under the Fourteenth Amendment, but it is also substantively, in itself, cruel and unusual punishment in violation of the Eighth Amendment.

In this complaint, Your Honor, Mr. McCray is requesting compensatory damages for the injuries that he suffered, physical and mental injuries that he suffered as a result of being in MO, also compensatory damages for violations of his constitutional rights, he is requesting punitive damages from the Defendant inasmuch as the Defendant acted in contravention of rules and procedures of the Maryland Penitentiary which the Defendant knew or should have known were constitutionally prescribed, and, therefore, directly in violation of the constitution, and to his knowledge.

We would call as the only witness, as one or two (400) witnesses, excuse me, Your Honor, for the Plaintiff, the Plaintiff himself to testify. This afternoon at 2:00 o'clock, Dr. Gould, who is an examining physician, will testify on Plaintiff's behalf.

(The Court) Yes.

(Mr. Morgan) We would have no other evidence except what may come in through cross-examination and any possible rebuttal evidence that may be necessary, which we don't anticipate at this time.

(The Court) All right.

Now, Counsellor, you agree, don't you, that Mr. McCray will testify this morning and then we'll take

the other Defendant witnesses out of turn in order to expedite the trial?

(Mr. Morgan) Yes, Your Honor, that' fine.

(The Court) All right.

(Mr. Rosenthal) The defense has no opening statement, Your Honor.

(The Court) All right.

(Mr. Rosenthal) We would deny all of the allegations and feel that the evidence will so show, but no formal opening statement.

(Mr. Morgan) Your Honor, the Plaintiff will take the stand on his own behalf.

Mr. McCray.

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(401) MILTON McCRAY,

the Plaintiff, resumed the witness stand, and, having been previously duly sworn, testified as follows:

(The Clerk) Just be seated, Mr. McCray, you were sworn on Tuesday in these cases and you are still under oath.

That's Milton McCray.

DIRECT EXAMINATION

By Mr. Morgan:

Q. Mr. McCray, you are the Plaintiff in this case, is that correct? A. Yes.

Q. Mr. McCray, can you explain, or can you tell the Court what your present address is, what your present residence is? A. 954 Forrest Street, Maryland Penitentiary.

(The Court) Now, Mr. McCray, you've got to keep your voice up.

(The Witness) 954 Forrest Street, Maryland Penitentiary.

By Mr. Morgan:

Q. Are you serving a sentence, Mr. McCray? A. Yes, I am.

Q. On what date did you begin serving that sentence? (402) A. January 4th, 1969.

Q. How old are you, Mr. McCray? A. 33.

Q. Mr. McCray, I direct your attention to December 31st, 1971, were you in the Penitentiary on that date? A. Yes.

Q. In the evening of December 31st, 1971, could you explain what your activities were in the Penitentiary? A. December 30th?

Q. December 31st, 1971. A. Well, I was not — it was a holiday for my employer at the Maryland Penitentiary and he relieved me of my duties the day before, which was on the 30th.

Q. Well, Mr. McCray, excuse me, directing your attention to the evening of December 31st, 1971, where were you living in the Penitentiary at that time? A. In population.

The 31st?

Yes.

Q. On the evening of the 31st? A. The evening?

The evening, I was in south wing.

Q. That would have been the evening of December 31st? A. Yes.

Q. Do you recall what cell you were in at that time? (403) A. 325, I think it was.

Q. Do you recall on what day and at what time on that particular occasion you were placed in south wing in that cell? A. It was about 10:00 o'clock, 11:00 o'clock, I think it was, 10:00 or 11:00 o'clock that morning.

Q. That morning? A. Yes.

Q. On the evening of December 31st, Mr. McCray, did you sleep in that cell? A. On the evening?

Q. Of December 31st, 1971. A. If I'm not — I wasn't put into that cell until — if I'm correct, I was not put in that cell until that night. For some reason, it has been so far back, for some reason I was put in that cell that night.

Q. Do you recall approximately what time? A. Oh, it was about 6:00 o'clock.

Q. All right, sir.

Now— A. About 6:00 or 7:00 o'clock that night.

Q. When you were placed in the cell that evening, what, if anything, did you do? A. Well, I remember the officer, Mr. Plazio—

(The Court) What, now?

(404) (The Witness) Lt. Plazio brought me on the tier and placed me in this cell, and I mentioned to him about the cell being full of trash and blankets on the floor where some other inmate must have been in there using it as a rug, and that it was untidy, and I would like to have someone clean it up that particular evening, he told me that it was too late to get anybody to clean it up and for me to the best I can that night and next day I could sweep the stuff out and he would instruct the officers to clean that particular cell.

So, I did what I could, you know, took the old blanket and swept the trash up to the door, the blanket, and all excess paper that was there, and I laid down and went to sleep.

I didn't even get a personal clean blanket and sheet that particular night because there was none available, according to the officer on that particular shift.

By Mr. Morgan:

Q. Mr. McCray, when you were placed in that cell, what, if anything, was in the cell besides yourself? A. Well, there was a blanket, I think there was two blankets, old blankets on the floor, they were filthy, they seemed to have been used for a walking mat for some inmate that was in there before. There was paper behind the toilet. There was paper, newspaper piled in the corner. There was an old locker laying on the floor.

(405) (The Court) An old locker?

(The Witness) Yes, a metal locker that must have came out of some other cell because there was one locker on the wall and one on the floor in there.

I took the blanket, tore a piece of it off, and went to the sink and proceeded to sweep as much of the trash as I can to the door and pile it there, I couldn't sweep it out on the tier because there was too much, my intentions at the time were to leave it at the door and sweep it out the next morning when the tier runner comes around to clean the tiers.

I took a blanket and I wet it and cleaned up as much around the trash as I possibly could, and laid down and went to sleep.

By Mr. Morgan:

Q. Now, Mr. McCray, the next morning, which would have been January 1st, 1972, what, if anything, unusual happened to you? A. Well, I woke up that morning and I was feeling quite tense, I don't usually smoke as a habit, but I called down the tier, I think it was about two cells or a cell away, and asked him to give me a cigarette and a light, he throwed it down the tier, he throwed it out on the tier, I took a piece of newspaper, rolled it up and made an extension out of it and drug it in under the door, and I laid down (406) and proceeded to smoke, and I must have dropped off to sleep. I did, I went to sleep.

When I woke up, I felt some heat on my hand, on my right hand, and I jumped up all of a sudden and I was dazed from the quickness of my being, you know, waking up, and the cell was full of smoke and I was confused, I was trying to stump the fire out and I grabbed the mattress off the bed.

Q. Excuse me, Mr. McCray, if I may interrupt.

Where in the cell was the fire? A. The fire was at the door, right at the door where all this trash was.

Q. You may continue. A. I jumped up, I tried to stump the trash out, and that didn't seem to work. So, the next thing came to mind was to try to smother it,

and I grabbed the mattress off the bed and throwed it on the fire, and while it was — the cell at that time was quite full of smoke, and while trying to smother the mattress, the mattress caught afire, and the mattress seemed to — while I was trying to smother it, after a while the mattress got heated and I couldn't, you know, touch it too well.

So, I remembered there was a bucket in the cell, so I ran over to the sink, grabbed the bucket, and because the bucket was quite large it was hard for me to adjust the bucket into the sink and push the button and get enough water (407) to put out the fire in time.

So, I remembered the locker I had, sitting on top of the toilet, after a while when I was cleaning the cell up I had taken the locker off the floor and put it on top of the toilet, so I could clean the cell as much as possible, so I grabbed the locker and I broke the sink so that I could get the water into the bucket much faster.

So, I did get a bucket of water, throwed it on the fire, the fire seemed to burn just that much more faster, and the next bucket of water just didn't seem it was coming out fast enough, so in my haste, I tried to get as much as I can out of the toilet, the toilet had a little water in it, and dip down there, try to flush the toilet at the same time to get more water, but that didn't work, so I took the locker and I broke the toilet and pushed the bucket under the toilet as I flushed it and that seemed to fill the bucket up much faster, and by that time all the water that I could throw on there was just — was of no benefit, and I was becoming exhausted from inhaling the smoke in the cell, so my next result was to get under the sink as much as I could, push the button and let the water from the sink run down over my head and try to wet my clothes until someone come along and open the door.

I could hear from the outside the inmates hollering that there was a fire and I was hoping that as a (408) result of this that the officers would get there in time to get me out before the fire really got to me.

Q. Mr. McCray, what was the condition of the cell at this time? A. At which time?

Q. During this series of events you've described A. The cell was filthy. I thought it was a store room for trash when I first went in, and I made this known to the officer, but he said this was the only cell available at that time, or he just didn't want to move me to another cell, he told me to clean it up and next day he would try to get a tier runner to remove the trash.

(Mr. Morgan) Your Honor, if I might lead the witness slightly just to develop the testimony.

By Mr. Morgan:

Q. Mr. McCray, with regard to the fire itself, what was the condition of the cell at this time, during the time that you were trying to put out the fire, during the time the fire was in the cell, could you describe, for example, the extent of the fire, any smoke that may have been coming from the fire, what you were experiencing as a result of the fire? A. Well, when I woke up, all of a sudden, I was dazed and the cell was quite full of smoke and I was trying to get myself together and put the fire out all at the same (409) time, and I just couldn't, I just, you know, I've done this before when I wake up all of a sudden, it's just hard for me to get myself together to the point I can realize exactly what's what, and when I did, got myself together, while stumping the fire out, too, the fire was at a stage where I couldn't do too much with it, and the only thing that I could think of to do was try to smother it before I went to try to get the water. The water was of no help.

Q. Mr. McCray, you testified that after — when you fell asleep, or you testified you did fall asleep and then woke up sometime later with a burning or a hot sensation on your hand? A. Yes.

Q. Could you describe exactly where you were in the cell at the time you went to sleep? A. I was laying in bed.

Q. All right.

Now, where is the bed in the cell? A. Well, the bed is on the—

Q. I suppose— A. —left-hand wall of the cell.

Q. Is that as you're looking into the cell? A. Looking into the cell, as you look into the cell the bed is on the left-hand wall, yes.

Q. I see.

(410) Mr. McCray, are you right-handed or left-handed? A. Right-handed.

Q. In relation to the bed, Mr. McCray, where is the door of the cell? A. It's on the — it's at the head of the bed.

Q. At the head of the bed? A. At the head of the bed, yes.

Q. Was it to the right or left of the bed? A. To the right.

Q. Now, I believe it was your testimony, Mr. McCray, that the trash in the cell that you described, you swept to the front of the cell, is that correct? A. Right, to the door, with intention of sweeping it out on the tier the next morning when the tier runner come by.

Q. I see.

Now, as you were lying on the bed, were you lying with your head into the cell or your head out toward the door? A. My head was at the head of the bed, toward the door.

Q. Mr. McCray, you said you heard hollering outside the door of the cell, did there come a time when you were let out of that cell, or that you got out of the cell? A. Got out — during the time that I was fighting to (411) put the fire out, an officer ran up to the door, and he ran back,I don't know whether he had anything with him or not, but he ran back and that's the only time I remember seeing an officer, you know, during the time I was trying to stump the fire out, and with the mattress and my feet, and the water, an officer ran up to the door and he ran back down the tier for some reason, I didn't see an officer no more until after, oh,

about, it looked like about 15, 20 minutes later when they did finally try to open the door and let me out.

Q. You were let out? A. About 20 minutes later, they let me out, after they had gotten a fire extinguisher to put it out, after the second time they got a fire extinguisher.

The first time they came down with a fire extinguisher, it wasn't working. The second time they came down they had — I heard this later — they had to go all the way to the powerhouse to get that one.

Q. Now, Mr. McCray, when you came out of the cell, what was your physical condition? A. I was burnt, I was in pain, I was — I had smoke in my lungs, I could barely breathe, I was coughing, I could barely stand up.

Q. Where were you burned, Mr. McCray? A. On my face, on both hands, I had — well, mainly (412) my face and my hands.

Q. Were your clothes burned? A. Yes, and on the — I think I got burned on the arm, my right sleeve was burned, and I think around my pants legs, burned a little.

Q. Mr. McCray, I believe you testified that from the time the fire started until the time you were released from the cell, it was approximately 15 or 20 minutes, is that correct? A. It seemed much longer than that, but I would say 15 minutes.

Q. That's an estimate on your part? A. Yes.

Q. All right, sir.

After you were released from the cell, Mr. McCray, what occurred, if anything, at that time? A. Well, the officers got me out of the cell, took me in the south wing area, and they were all laughing, chuckling, and they stood me in front of a light, took a picture of me, and I think the Wing Officer said, take him down the hospital, and I was taken down the hospital, and I saw Mrs. Webb, or Webber, and I think it was Sgt. Martin.

(The Court) Saw Mrs. — what is the name?

(The Witness) Webber or Webb, I don't know.

(Mr. Rosenthal) For the record, Your Honor, it's (413) Nurse Weber, W-e-b-e-r.

(The Witness) She applied — she washed my face, or had an inmate wash my face, and she gave me some type of cough medicine, I've had the medicine since then and it was given to me for a cold.

And—

(Mr. Rosenthal) Your Honor please, I object to the last statement, that the medicine was given to him for a cold, unless he so can follow up on that statement.

(The Witness) Well, I can, this is a fact, that same medicine since then.

(Mr. Rosenthal) Oh, since then.

I'm sorry, I thought you meant, the time you were given that medicine for a cold.

(The Witness) No, I had some red medicine they gave me and it's for a cold.

By Mr. Morgan:

Q. It's a liquid medicine? A. A liquid medicine.

Q. Mr. McCray, at any time during the series of events that you've described beginning on the evening of December 31st, 1971, through the time that you were in the hospital on January 1st, 1972, and I assume that that would have been the morning of January 1st? A. Yes.

(414) Q. At any time during that period, did you see the Defendant, Mr. Burrell? A. Well, after I was placed — after I was taken to the hospital, Mr. Burrell showed up, and while the nurse was — while the inmate was washing my face and applying this solution, she was inquiring where was I burned, and I told her, and I think I saw him standing over to the side.

Q. Did Mr. Burrell say anything to you at that time? A. No, he was just standing there, you know.

Q. Did he ask you about the fire? A. No, he said nothing to me about any fire.

So, after Mrs. Webb finished administering the — the inmate finished washing my face and giving me the

medicine, I think Mrs. Webb suggested I be put into a locked cell that they usually have for guys that come up from the south wing, and Mr. Burrell said, put him in MO.

(The Court) In what?

(The Witness) MO, that's medical observation cell.

Well, two officers took me up and they placed me in — took off all my clothes that I had, which were burned, and proceeded to put me into this MO cell, and I asked, I said, am I to get a shower, because my whole body was full of smoke, et cetera, and I would like to have a shower, at least before I go in the cell. They told me that I would have to wait until I see the doctor before anything can be done because (415) of my burns.

So, I was placed in the cell, and after I got in the cell, I saw the condition of the cell and I called out the door to the officers and asked them was they going to try to clean this cell up, because the hole that was in the floor that is used for a toilet had excrement all around it where some inmate must have missed the hole when he was taking care of his privates, and he told me that they would send someone, an inmate, in later and advise the officer in charge of MO to have somebody clean it up.

This was never done.

Well, the whole time I was in MO for those few days—

(The Court) How long were you in there?

(The Witness) I think it was — I stayed in there about two days.

An inmate, friend of mine, saw the condition that I was in and he asked me did I know the phone number of my mother and that he would—

(Mr. Rosenthal) Your Honor please, for the record, we voice an objection to the conversation between the other inmate and—

(The Court) All right, just tell what happened, Mr. McCray.

(416) By Mr. Morgan:

Q. You said you spoke to another inmate? A. Yes.

Q. And what did you say to the other inmate? A. Well, he asked me—

(Mr. Rosenthal) Well, again, Your Honor—

(The Witness) What did I say to him?

By Mr. Morgan:

Q. Mr. McCray, the Defendant objects, so you can't testify to anything the other inmate said to you, you can testify to what you said to him. A. Well, I told him—

(Mr. Rosenthal) Well, I'm not so sure of that, either, Your Honor.

(The Court) Why don't you testify as to what happened?

(Mr. Rosenthal) That's all.

(The Court) What did you do, did your mother come there, or what?

(The Witness) Yes, my mother came, my mother called to try to find out what was the reason for me being in MO, and that she heard that I was burned pretty bad as a result and that I wasn't receiving proper medical treatment, and the next day, I think it was, I was — I can't say what I was told — well, the next day, Capt. Burrell, I heard an officer (417) of the tier say that — tell one of the other inmates that I—

(Mr. Rosenthal) Again, Your Honor, may counsel approach the Bench, Your Honor, I hesitate to object because I want to give Mr. McCray as full a hearing as possible, but, on the other hand, we do have Mr. Burrell here and I am here today to represent his rights, and for that reason I do object to any conversations with other inmates or anyone else who are not here.

(The Court) That's correct.

Just tell what happened, Mr. McCray.

By Mr. Morgan:

Q. Mr. McCray, let me ask you some more direct questions and perhaps we can avoid that problem.

Going back to the point at which you were placed into the MO, or medical observation. A. Yes.

Q. As you understand it to be, the cell.

You testified that your clothes were taken off, is that correct? A. Yes, they were taken off me.

Q. All your clothes? A. All.

Q. Can you recall approximately what time of day this was on January 1st? A. That morning, about maybe 9:00 or 10:00 o'clock, (418) at the time in south wing, in that area, you very seldom can keep up — I would say that morning, how close to 12:00 or 8:00, I couldn't say, I'll say approximately 10:00 or 10:30.

Q. Now, do you recall what day you were released from the mental observation cell? A. That was about two days later, I think.

Q. All right, sir.

Now, during that period of two days, did you ever have clothes to wear in the cell? A. Oh, no, none at all.

Q. All right.

Now, when you were placed in mental observation, you testified as to one aspect of it, the cleanliness of it.

Can you describe every other aspect of the cell that you can recall when you entered it that day? A. Well, it's the — well, this particular cell is the only cell, Number 8 Cell that I was put in, had a big sheet of metal over the window, no windows to the cell, just four walls and a hole in the floor, and the outside door and the inside door, one that's wood, the solid door, the other one is just the bars.

Q. Were either or both of those doors closed while you were in the cell? A. Well, when I first went in, they closed the— (419) after I was trying to — they locked the steel door, the metal door, and when I started to request my showers and seeing a doctor, they locked the outside door, and that stayed locked until the time for them to feed up the inmates, the food, at that particular time.

Q. How large is the hole in the floor you described, Mr. McCray? A. The hole in the floor is about six or eight inches round.

Q. Is it exactly in the center of the cell, or is it to one side? A. To the side, just as you go in the door, it's sitting in the floor.

Q. Is there anything over the hole? A. There's a metal plate with holes in it, you know, you have to adjust yourself to do your own private.

Q. Was there any toilet paper in the cell? A. No, no toilet paper.

Q. Could you describe the construction of the walls? A. The walls were all concrete, cement walls, the floor was tile, and that is all.

Q. What color were the walls, Mr. McCray? A. I think they were red.

Q. Is there a light in the cell, Mr. McCray? A. Yes, there's a light there, I remember the light (420) being on that night, it was turned on that night.

Q. Now, during the two-day period that you were in MO, Mr. McCray, was there at any time anything in the cell with you other than what you've already described? A. They would not give me anything except for the food that they brought by and shoved through a hole, that was all.

Q. How many nights did you spend in the cell, Mr. McCray? A. Two nights, I think it was, two or three nights.

Q. Did you sleep during those nights? A. Oh, no, it was impossible to sleep; how can you find a soft spot nude on a cement floor? You can't sleep at all. You might doze off, but I stood up most of that night, the floor was cold.

Q. Mr. McCray, at any time during the period when you were in MO, did you see the Defendant, Mr. Burrell? A. He never came back in the observation area that I saw him. The first and last time I saw him that time was when I was being administered medicine.

(Mr. Rosenthal) I'm sorry, would you repeat that, please?

(The Witness) The first and the last time was when I was administered medicine in the dispensary.

By Mr. Morgan:

Q. Mr. McCray, at any time during the period when you (421) were in MO, were you visited at your cell by anyone? A. No one.

Officers came by about three or four times a day, or maybe an inmate was to make a lot of noise he may come back, and each time I asked him, I tried to get some medicine for my throat because I was at that time coughing up quite a bit of black solution, phlegm, and I showed him this, I had a whole cupful, and I figured that the only way I could keep him coming near me was to every time I called for help, just spit it into this milk carton that they had given me, you know, of milk, and I had a whole cupful, and I showed it to the officer and told him that I had to have something, you know, to try to clear my throat up, or I had to see a doctor, and each time he told me he was under orders not to give me anything until I saw a doctor.

Q. Did you ever see a doctor, Mr. McCray, while you were in MO? A. I never saw a doctor while I was in MO.

Q. Aside from the time you've already described when you saw Nurse Weber, did you ever see Nurse Weber, or any other nurse, while you were in MO? A. No doctor or nurse came to see me while I was in there. I asked many times to see a doctor because of the pain I was in as a result of the burning on my face and hands and because of the difficulty I had breathing during that (422) time.

Q. Do you know Dr. Campbell, Mr. McCray? A. Yes, very well.

Q. Did you know Dr. Campbell at this time? A. Yes.

Q. During the period of time when you were in MO, did you see Dr. Campbell? A. Not once.

Q. He never came into MO to talk to you? A. He never talked to me.

I don't think he was even on that day.

Q. Mr. McCray, are you familiar, or at that time were you familiar with the adjustment or disciplinary procedures at the Penitentiary? A. Yes.

Q. You were familiar at that time with a notice of offense? A. Yes.

Q. Were you familiar with adjustment team hearings? A. Yes.

Q. All right.

Nor, at any time, did you receive a notice of offense concerning any of what you've described today? A. Burning in the cell?

Q. That's right. (423) A. Yes.

Q. Do you recall when? A. No. That was sometime after when I was placed — after I was removed from the south wing, I mean, was taken back to south wing, I think maybe 15, 20 days.

Q. Did you receive the notice while you were in MO? A. No, I definitely didn't receive it.

Q. Now, did you have a disciplinary or adjustment hearing as a result of that charge? A. Yes.

Q. What was the disposition of the charge? A. I was given 30 days, I think it was, I was charged $80.00 for the destruction of the sink and the toilet, I think it was. That was the only property that was destroyed at that time.

Q. Mr. McCray, I have two documents I'll ask if you can identify.

The first is a handwritten letter, can you identify that? A. Yes, I sent one to—

Q. What is that? A. This is a letter to Mr. Hawkins, Col. Lally, Chief Judge Northrop, Judge Roszel Thomsen, Mr. Jordan, and a Mrs. Deborah Bollmer, B-o-l-l-m-e-r.

Q. Did you write this letter, Mr. McCray? (424) A. Yes, I did.

Q. All right.

Now, can you identify the other piece of paper? A. Yes.

This is a letter from Mr. Hawkins to me.

Q. Did you actually receive that letter? A. Yes.

Q. All right, sir.

(Mr. Morgan) We would move to introduce these as Plaintiff's Exhibit Number 1.

(Mr. Rosenthal) As I understand, Your Honor, these are in the Plaintiff's file.

(The Court) What?

(Mr. Rosenthal) Are in Mr. McCray's base file.

(The Court) All right.

(Mr. Morgan) These are part of his institutional record, Your Honor, that we discovered through the production of documents.

(The Clerk) Plaintiff's Exhibit Number 1, letter from McCray; and the reply letter to McCray is Plaintiff's Exhibit 2.

(Documents were marked Plaintiff's Exhibits Numbers 1 and 2.)

(The Court) To Mr. McCray is Exhibit 2?

(The Clerk) Letter to McCray.

(425) By Mr. Morgan:

Q. Mr. McCray, do you know Dr. Gould? A. Yes.

Q. Did you know him at this time? A. Yes.

Q. At any time after this incident of your being burned in your cell, did you have occasion to see Dr. Gould? A. Yes, 13 days after, on the 13th of January was the first time I saw Dr. Gould.

Q. All right, sir. A. But the first time, that's the first time after this.

Q. That's right. A. Yes.

Q. Mr. McCray, during the period of time that you were in MO, were you at any time removed from MO? A. No. Not even for a shower that I requested each of those days that I was up there.

Q. From, as I understand your testimony, from the time that you were placed in MO, the morning of January 1st, 1972, until the time you were released, which as you testified was approximately two days later, you were not released from that cell at any time, is that right? A. No, I wasn't.

Q. And I believe it's also your testimony that during (426) that period of time there was never anything in that cell with the exception of yourself, is that correct? A. That's correct.

Q. There was never any physical item of any kind in the cell with you? A. Nothing at all. I couldn't even get toilet paper in the cell.

Q. Mr. McCray, again directing your attention specifically to that two-day period that you were in MO, what was the injury — what, if any, injury, as a result of the fire, did you have to your body? A. My hands were burned, and both hands were burned as a result of me trying to put the fire out, and my face was burned, mostly from the heat of the cell, all over my face was quite burned, and the whole time I was in MO all I could do was think about how much I was suffering and there was just nobody I could call to bring that fact to their attention, or cared enough to at least try to give me some type of relief or to give me something that would ease some of the pain I was under.

Coupled with the fact that I was on that floor trying to sleep those few nights with nothing.

I recall breaking down a couple of times there during the night when I couldn't sleep, twisting, turning, when I would lay on my hand and feel the pain from it, (427) breaking down and crying, not so much because of the pain, but because I just couldn't get anybody to do anything for me at a time that I really needed something done.

(Mr. Morgan) Thank you, Mr. McCray.

I don't have any other questions.

CROSS EXAMINATION

By Mr. Rosenthal:

Q. Now, Mr. McCray, prior to being placed on the south wing on December 31st, was it? A. Yes.

Q. You were in the general population? A. Yes, I assume that.

Q. Do you recall why you were placed in the south wing? A. Let's see. I think so, yes.

Q. Why was that, sir? A. On December — going back to December 30th, I was working in the library during that time, and on December the 30th, my employer told me that — told me and the other inmate, the librarians, that we were not — the library was closed and we were not to report to work that next day.

So, on the 31st, that morning, the policy of the institution is that you report to work every morning, but when you're not supposed to work, you don't have to report, you know.

(428) I just got in the institution around that time.

So, instead of me going to report to work that morning, I went to the print shop and was talking to one of my friends, not my friend, my brother-in-law, and I think I stayed down there, supposed to go in 8:30, 9:00 o'clock, and during this time the officers that was running the school must have called the Captain, told him that I hadn't reported to work, and they, in turn, must have been looking for me, I think about 15 or 20 minutes, and when they did find me I was at the print shop talking to a friend of mind, this officer escorted me to the Captain's office, and he asked me why I did not report to work, and I explained to him that my employer told me that he was going to be off the next day, the library was going to be closed and there was no use of me reporting to work that next morning.

The Captain, in turn, ordered me locked up. I, of course, told him that this was unnecessary since the next day was a holiday and all he had to do was call my employer up and ask him whether or not he instructed me not to report to work that next morning.

He wouldn't consider that, he just said, lock him up. So, I was placed in south wing.

I think that's the incident that caused me being locked up on the south wing.

Q. Now, who was your employer, sir? (429) A. Mr. Brown.

Q. I'm sorry? A. Mr. Brown.

Q. Is he still at the institution? A. Yes, he is.

Q. Now, what is a count-down, are you familiar with that term at the Penitentiary, or a count? A. Not personally. I assume that it means that they count the inmates that's in the institution, on jobs, or — et cetera.

Q. And isn't this what you were charged with, failing to be at a count? A. As a result of that incident, yes, at the print shop.

I was later found not guilty of it, because my employer came into the disciplinary board and testified just what I just testified to, they found me not guilty because he said that he did instruct me not to report the next day.

Q. And so, you protested when you were placed on the south wing, is that what you just testified? A. Protest?

Q. Protested, you were upset? A. I didn't like the idea of being placed on the south wing, but as far as protest, no.

Q. I thought you said you protested because you told— (430) A. When I say protest, I mean verbally express my dislike for being placed on south wing for something I was not responsible or guilty of.

Q. And you were upset about this because you felt it was unfair, is that correct? A. Not upset, I just didn't like it.

Q. And then you were taken to the south wing, is that correct? A. Yes.

Q. And you had your clothing with you at that time, that you were wearing? A. Yes.

Q. Now, Mr. McCray, you state that the bed is on the left-hand side of the cell as you're looking through the door, is that correct? A. Yes.

Q. Now, isn't it customary for the inmates to sleep with their feet towards the door and their head away from the door, at the far end? A. No. All the inmates I know sleep with their head toward the door, because the door, where it's a big metal plate, the door is the only opening to the cell, it's a big plate that your head is against, your head is not exposed to any danger.

Q. Did you have a pillow? (431) A. No, no pillow was there, that I saw, no. There's usually no pillows in any of those cells over there.

Q. Now, you slept there the evening of the 31st, is that correct, sir, or you were in the cell, whether you slept or did not sleep? A. I was not in that cell the evening of the 31st, I wasn't put in that cell until night, sometime, I don't know exactly where I came from or— but I do know that I was put in that cell that evening because I remember telling the officer that I wanted the tier runner to clean the cell up, and he said it was too late to clean it, and he told me to do the best I could with it until the next day.

Q. Do you remember the date of the first evening that you slept in this cell in the south wing? A. That was the night of the 31st.

Q. All right, of '71? A. 1971.

Q. Do you recall what day of the week this might have been, if you recall? A. No, I don't recall the day, no. I know it was the day before New Year.

Q. All right, and, as I understand it, you swept all this trash towards the door, is that correct? A. Right up to the door.

Q. It was directly in front of the door? (432) A. Right in the opening there.

Q. And the next morning, was your breakfast served? A. Yes, it was.

Q. And do you know of any reason why this trash was not removed at that time? A. Because no one was available.

Q. I'm sorry, I didn't here you. A. Because — no, there's no reason why — yes, there is a reason, I can't sweep it out while the food cart is coming down the tier, have to wait until after all the food has been given out and then the tier runner comes along after everybody eats they have to — their usual policy is to take the plastic containers and throw them out on the tier and then the tier runner comes along and cleans this up.

Q. Now, what time is breakfast served? A. About 9:00 o'clock, 8:00 o'clock, 9:00 o'clock, 9:30, they serve whenever they get time in the morning, it's usually before 10:00 o'clock.

Q. And what, if anything, did you do with your breakfast utensils or trash, or whatever it may be called? A. I don't know if I throwed it out on the tier, or whether I just dropped it right at the door until the tier runner came by and I could hand them out to him.

Q. But it is possible you placed them out on the tier, is that correct, slide them back under the barred (433) door? A. No, you have to pick these things up and it's too small, too low for you to shove it under the bar, you can just barely get your hand, your finger through the bars, the opening is just big enough — oh, it's about two and a half inches high anything through there, so you have to force these things through this hole.

Q. Are you talking about at the bottom of the door? A. I'm talking about where they put the food through the door, the bottom of the door is too close.

Q. How does the food come into your cell? A. It comes through the food slot, just about two and a half inches high and about 13 inches wide.

Q. So, if it comes through the food slot, it can also be pushed back out through the food slot? A. Same thing, yes.

Q. Well, why couldn't the rest of your trash in the cell be placed through this food slot, if it was newspapers? A. No reason why it couldn't, except for the fact that I couldn't push it out there until it was time for the tier runner to come along and clean it up.

Q. Well, how do you know what time he comes by? A. When he comes down the tier.

Q. And you can't put your food tray, your empty food (434) tray back through the slot until he comes back down? A. I don't know. I can, but—

Q. But you didn't? A. I didn't, yes.

Q. So, it's your testimony, if I understand it, that you could have placed your food untensils back under the food slot along with some or all of the trash prior to the time of the fire, is that correct? A. Yes, I could have, yes.

Q. All right.

Now, Mr. McCray, as you were allegedly smoking, what was your position in bed, were you laying on your back? A. Laying on my back.

Q. And tell us briefly exactly how you were smoking. A. Laying on my back with a cigarette in my hand, smoking.

Q. And the cigarette was in your right hand, is that correct? A. Ahuh.

Q. Now, what is the distance between the wall, the cell wall which has the door in it— A. Yes.

Q. —and the beginning of the bunk? A. About — you mean—

Q. Let me give you an example, if I may. (435) A. Yes.

Q. If this represents— A. Could you draw a picture?

Q. No, let me give it to you this way, I think it would be easier to understand.

For the record, if the table at which the Defendant is seated, represents the door of the cell— A. Right.

Q. —how far back would the bunk be, would it be from this table to this table? A. I can give it to you right here.

(Drawing.)

This is a door. This is the bunk, I'll say the bunk is sitting here, it's set about right here.

This is the way it is, this is the door here, this is the door, this is the bunk.

Q. That's right.

Now, what is this? A. This is metal here.

Q. Let's forget this. A. Right.

Q. This is the door that someone would come in? A. Correct.

Q. And this is the beginning of the bed? A. Right.

(436) Q. Now, what is the distance between this door, the wall holding the door, and the bunk, or bed about 18 inches, 24 inches? A. This is awfully close, about six inches.

Q. Now, is the bed in such a position that if someone placed their hand through the bar, they would touch you? A. It's impossible to get your whole hand through that bar.

Q. Okay.

How long after you had breakfast did you start smoking? A. I can't remember whether I actually — it was after breakfast or before breakfast, but I would say, just offhand, it was after, and it wasn't very long, because the tier runner hadn't come by, I was positive of that because I was waiting for him, I was waiting for him to come by so I could shove the trash out, and it couldn't have been very long.

Q. Now, what is the first thing you did immediately after you realized there was a fire? A. I tried to stump this fire out.

Q. And you do acknowledge that you took this cabinet and broke your sink and the toilet? A. Yes.

Q. There's no question about that? (437) A. No question at all.

Q. Now, did you ever have any showers while you were on mental observation? A. None.

I have never had a shower, even mental observation or south wing, other than showers that they give just on Saturday, regardless of Dr. Gould's prescription, prescribed — prescription prescribing, actually ordering that I should have a shower every day, no one would give me a shower and I have made many requests for that.

Q. All right.

Now, you also testified, as I understood it, that the only time you ever saw Mr. Burrell was the one time at the dispensary? A. That was the only time.

Q. Did you receive any medication while you were on mental observation? A. The officers I asked about medication told me that they were not to give me anything until I saw a doctor, they were at orders not to give me anything, I don't know who the orders was handed down by, but they told me, upon each request that I made, and I made them at every opportunity I got, that I was not to have anything until the doctor saw me.

Q. Then if the records of the Penitentiary relate that (438) you did have medication, are you still denying that you had medication? A. Yes. If the records of the Maryland Penitentiary state that I got medication during that time, I will deny it, it was not given to me.

Q. Do you recall hitting the wall or door, or anything else, with your fists when you were in the mental observation section? A. No.

Q. Do you remember skinning your knuckles by hitting on the grill door? A. No.

Q. So, if there's a report of that in the institution records, that, also, would be false, is that what you're saying? A. Yes, I am saying that.

Q. And let me ask you this question, Mr. McCray, with reference to the letter that you sent in to the

various people, that's in as Exhibit Number 1, it's dated February 15th, is that correct; I mean, I'll show it to you, this does say February 15th, is that correct? A. Yes, it does.

Q. And when did you have your hearing for the destruction of this property? A. I don't recall exactly what date, I know I did (439) have a hearing.

Q. It would have to be after the fire, is that correct? A. After the fire.

Q. The fire was on January 1st, is that correct? A. Yes.

Q. And, therefore, between January 1st and February 15th, the maximum time— A. I had to have a hearing, yes.

Q. —would be 45 days during that period, 30 days in January, and 15 in February? A. Yes.

Q. And you have in your letter 55 days, I assume that that is an unintentional mistake, is that correct? A. 55 days, yes.

Q. But, at most, it would be 45 days, and even then, you could not have been placed in segregation until after your disciplinary hearing, isn't that correct? A. Couldn't have been what?

Q. You had a hearing, you were complaining in this letter about the hearing— A. Yes.

Q. —in which— A. Right.

Q. —you received six months and an $80.00 fine. (440) A. Yes.

Q. That hearing had to take place after the fire and prior to February 15th? A. Yes.

Q. Now, Mr. McCray, isn't it a fact that you were upset about being placed in the south wing because you felt that you had been wronged? A. I don't think anybody—

(Mr. Morgan) Your Honor, I object to that, unless it's placed in time.

Wait a second, Mr. McCray.

I think there should be a specific time we're talking about on that.

By Mr. Rosenthal:

Q. Isn't it a fact, Mr. McCray, that on December 31st, 1971, when you believed that you were off, and you were brought in and taken to the south wing, that you were very upset because you thought you had been wronged? A. I didn't like the idea, I would say that I difinitely didn't like it.

Q. And isn't it a fact that you set this cell on fire? A. It is not a fact that I set that cell on fire.

(Mr. Rosenthal) I have no further questions, Your Honor.

(441) REDIRECT EXAMINATION

By Mr. Morgan:

Q. Mr. McCray, to qualify your last statement, would it be your testimony that you did not set the cell on fire purposely, you're not suggesting someone else set the cell on fire, are you? A. To tell the truth, I don't know how the cell got on fire, but I assume from the fact that I was smoking at that time that the fire was started as a result of the cigarette, but if somebody stuck a match in there and started it, I don't know, but I would assume this, I would just say the most logical reason for it being started was as a result of this cigarette.

Q. Okay, sir.

Mr. Rosenthal cross-examined you quite extensively on the question of your pushing this trash out onto the tier. A. Yes.

Q. For the tier men to pick up.

I'm wondering if there's any regulation on the south wing, or if there was any regulation at that time, rather, concerning the procedure for pushing trash onto the tier to be picked up? A. It's a fact, if you was to push trash out on that tier after — during times that the tier runner has not (442) cleaned the tier or before the times for him to clean up, because they come by every morning to clean the tiers up, and they clean it up again at noontime, and again at 4:00.

Now, any excess trash on the tier between those hours, you're subject to a ticket, because not only that, you become an enemy of the tier runner and he doesn't like it and he personally comes down and expresses his dislike for making extra work for him, so that it is one of the main reasons why I did not push trash out on the tier, to avoid giving the tier runner extra work, and the tier runners can be a great help to inmates when they're in those cells, errands from one cell to another, and that's one of the main reasons why I did not push this trash out on the tier, I mean, during times that I know that the tier runner was not there.

Q. By a ticket, do you mean a notice of an offense? A. Right.

I have swept trash out on the tier at night and have the officer come by and make me put it back in.

Q. I see.

Mr. McCray, you testified and admitted, in fact, breaking the sink and the toilet with the cabinet in your cell? A. Yes.

Q. All right.

(443) I believe you testified on direct examination that there were two cabinets in your cell, is that right? A. There were two.

Q. And I believe you testified that there was one cabinet that was attached to the wall and that there was one cabinet that was lying on the floor— A. Yes.

Q. —is that right? A. This was a regular—

Q. Now, which cabinet did you use to break the sink and the toilet? A. The one that was — it wasn't on the floor at this time because I had taken it off the floor and put it on the toilet while cleaning the cell that night, and it was available to break the sink to make it easier for me to get the water for the fire.

Q. Did, at any time while you were in the cell, did you take the cabinet that was attached to the wall off the wall? A. That was impossible to smash one of those cabinets off that wall.

(Mr. Morgan) Okay, sir.

RECROSS EXAMINATION

By Mr. Rosenthal:

Q. How high is the cabinet, Mr. McCray? (444) A. I would say about 10, 12 feet, about 10 feet, about if I stand up, I would be able to reach on top of it, yes.

Q. And how was that held to the wall? A. It's bolted to the wall, or welded, one of the two, it's bolted, more or less.

(Mr. Morgan) This is redirect, right?

(Mr. Rosenthal) Right, you asked him about the cabinet.

(Mr. Morgan) Well, I hadn't finished.

(Mr. Rosenthal) I'm sorry, excuse me, I thought you had finished.

REDIRECT EXAMINATION (Resumed)

By Mr. Morgan:

Q. Mr. McCray, you testified that when you were in MO you were told by the Correctional Officer that you would not receive anything until you saw a doctor, is that correct? A. He didn't give me anything, not even — I asked him for cough drops, I thought that would be a simple request, and he told me he couldn't even give me cough drops.

Q. And it's your testimony that during that period of time, I believe, that you did not see a doctor, is that correct? A. I did not.

(445) Q. Mr. Rosenthal asked you if Maryland Penitentiary records would indicate that you received medication during this period of time, you stated that those records would be wrong? A. Yes.

Q. Now, on direct examination, you did testify that when you initially came to the hospital area, you did get some medication, isn't that right? A. Oh, when I answered his question I meant during the time I was — after that particular period, I didn't mean to include that as an answer to his question.

(Mr. Morgan) All right.

Thank you, Mr. McCray.

RECROSS EXAMINATION (Resumed)

By Mr. Rosenthal:

Q. Mr. McCray, getting back to the trash, you said you would receiv a ticket if you put it under the door, is that correct? A. Not necessarily, but there was a possibility, I've known inmates that has been given a ticket or reprimanded, one of the two, either by the tier runner or the officer, and you can't afford to rub either one wrong in that particular environment.

Q. Now, tell me, if you will, you mentioned that there was some trash there and some newspaper? (446) A. Yes.

Q. Now, I don't mean to be repetitive, but how much newspaper was in there, one day's newspapers, ten days? A. Oh, no, it was just — newspaper piled in the corner, the one behind the toilet was all balled up, the one that was sitting on top of the mattress, I mean on top of the blanket that was on the floor, looked like paper that somebody had stored in therefor maybe reading purposes, et cetera, he was taken out of the cell, and that—

Q. Were there any cartons in the cell? A. Food containers, yes, there was food containers that had been eaten out of and not — everything just throwed over in the corner on the floor. The cups that he drunk out of was piled back there. Many of the food containers they used — were used for something like a chair by the inmate, you know, to sit on it, because they don't have a chair in the cell, and they get — the tier runner gives these containers out monthly and they use them to sit on, and they were stacked up about 18 inches high.

Q. After this trash caught on fire, you threw the two blankets on— A. No, the two blankets were at the door, and the newspaper and the containers and all were shoved up to the door as a result of the night before, semi-cleaning I had.

Q. Were the blankets folded when you put them up (447) against the door? A. No, they were filthy, I just kicked as much of the heavy stuff to the door, and the rest I took a piece of paper, or one of the cartons, and scraped the trash up to the door.

The balance, I cleaned as much of that as I possibly could.

Q. And the mattress, you threw on top of the fire after it started and you couldn't control it? A. When I couldn't control it, I grabbed this mattress and I tried to smother it, and the smoke and everything was — had me just about exhausted by that time, that's when I tried to use the water.

(Mr. Rosenthal) I have no further questions, Your Honor.

(The Court) All right.

(The Court) Have you all got the stipulations in reference to the record that you were speaking about?

(Mr. Rosenthal) I handed that to Mr. Morgan this morning, Your Honor, and he was about to go over them with Mr. McCray when court started in session.

(Mr. Morgan) We have them right here, Your Honor, we'll go over them as quickly as possible and get them into evidence.

(448) You may step down, Mr. McCray.

(The Court) Well, do you want him to make any explanations of these charges?

(Mr. Morgan) Well, Your Honor, perhaps the easiest way to do it would be for me to go over them with him and then we can stipulate to what is agreed to. If there's any disagreement, perhaps he could testify to it.

I think we're going to be able to stipulate to the prior convictions.

(The Court) All right, how long — well, do it now.

(Mr. Morgan) All right.

(Conference between attorney and his client.)

(The Court) Well, we will take a 15-minute recess while you do that.

(At the conclusion of a short recess, the following proceedings were had:)

(The Court) All right.

(Mr. Rosenthal) If Your Honor please, counsel for both sides have stipulated to the record of McCray where he was, in fact, represented by counsel.

In chronological order, beginning with the first, Mr. McCray was found guilty of burglary on January 7, 1960, Baltimore, Maryland, received a sentence of four years.

On November 27, 1963, Mr. McCray was charged with two counts of burglary in Baltimore, Maryland, received an (449) 18-month sentence as to each to run consecutively.

(The Court) Two counts?

(Mr. Rosenthal) Of burglary.

(The Court) Yes.

(Mr. Rosenthal) Was found guilty on both counts, received 18 months for each to run consecutively, making a total sentence of three years.

On October 21, 1969, Mr. McCray received a total sentence of 28 years, Your Honor, which he is presently serving, for the following charges:

One, assault with intent to murder;

Two, receiving stolen goods;

Three, uttering;

Four, deadly weapon charge;

And another assault with intent to murder.

(The Court) All right.

(Mr. Rosenthal) The record before the Court, Your Honor, the Defendant would request that Mr. McCray return to the stand for just one question.

(The Court) All right.

(Mr. Rosenthal) Mr. McCray.

(450) MILTON McCRAY,

the Plaintiff, resumed the witness stand, and, having been previously duly sworn, testified further, as follows:

RECROSS EXAMINATION (Resumed)

By Mr. Rosenthal:

Q. Mr. McCray, I believe that when you just testified, you stated that at the hearing of the adjustment team for the violation of being, or missing count, or not being at work— A. Yes.

Q. —that you were found not guilty? A. Yes, it was something similar to that, I think it was.

I know my — I was taken off the south wing right after that, I don't know—

Q. Let me try to refresh your memory, Mr. McCray, I'm reading from your base file, the hearing took place on January 5th, 1972 and the Board's conclusion, after you plead not guilty and stated I'm not guilty, found you guilty of failure to report to his work assignment for count, and recommends a reprimand. A. Yes. Well, that's right.

Q. This was a split decision, two to one, but you do recall having been found guilty of that infraction? (451) A. Yes.

Well, when I said, found not guilty, I was referring to the reprimand, I consider that as a release.

(Mr. Rosenthal) I have no further questions of the witness, Your Honor.

(The Court) All right.

(The Clerk) That's all.

(The Court) All right.

(Mr. Morgan) Your Honor, the only other evidence on behalf of the Plaintiff would be Dr. Gould's testimony and he will be here at 2:00 o'clock.

(The Court) Yes, sir.

(Mr. Morgan) As I understand it.

(Mr. Rosenthal) We will call Mr. Burrell to the stand.

ROBERT BURRELL,

the Defendant, was called as a witness for and on behalf of the Defendant, and, having been first duly sworn, testified as follows:

(The Clerk) State your name.

(The Witness) Robert Burrell.

(The Clerk) Thank you.

(452) DIRECT EXAMINATION

By Mr. Rosenthal:

Q. Now, what is your present occupation, Mr. Burrell? A. I am Hearing Officer for the Division of Correction.

Q. And how long have you had that position? A. I was appointed in March of last year.

Q. 1972? A. Yes.

Q. And previously to that, what was your occupation? A. I was a Correctional Officer for the Maryland Penitentiary.

Q. And how long had you held that position? A. I was appointed in 1951, August 21st.

Q. And at the time — excuse me — in December of 1971 and January of 1972, what was your position at the Maryland Penitentiary? A. I was Duty Captain of the day shift, 8:00 to 4:00.

Q. And what exactly does this entail? A. This position is responsible for the daily operation of the institution under the supervision of the Major, Deputy Warden, Warden.

I have all officer assignments, all routine matters would be coming to me for disposition or to be referred to the proper people for disposition.

Q. Now, when you say, Mr. Burrell, all routine matters, (453) are you talking about for a particular section of the Penitentiary? A. The entire institution.

Q. And this was the position that you held on December 30th, 1971, is that correct? A. That's correct.

Q. Now, are you familiar with Mr. McCray, the Plaintiff in this case? A. Yes, sir.

Q. And are you familiar with the incident which took place on January 1st, 1972, with reference to Mr. McCray? A. I refreshed my memory from my reports prior to that time and—

Q. Do you have a copy of your reports with you? A. Yes, sir.

Q. All right.

Now, when, if you can recall, was the first time that you had any knowledge of the fire in the cell of Mr. McCray? A. Approximately 9:20.

Q. Is that a.m. or p.m.? A. a.m.

Q. On January 1st, 1972? A. That is correct.

Q. What report, if any, did you receive? A. I don't remember receiving the report, as such. (454) Based on my report, I received a report which was probably verbal, either by phone or perhaps radio.

Q. Well, what did you receive? A. I was informed by Sgt. Witte that Inmate McCray had set his cell on fire.

Q. And what, if anything, did you direct — was it Officer Witte? A. Sgt. Witte, W-i-t-t-e.

Q. Yes.

What did you direct him to do, if anything? A. I told Sgt. Witte that the man was to be taken to the hospital and seen by the nurse on duty and then he was to be placed in the mental observation unit.

Q. Now, to your knowledge, was this done? A. Yes, sir.

Q. And did you see the Plaintiff, Mr. McCray, at any time? A. Yes, sir.

Q. And when was that? A. I do not remember the exact date that it took place, it took place in the hospital at some time, the time area I do not know just exactly when it was.

Q. Was he being treated at that time? A. I don't remember, sir.

Q. Can you recall his physical condition with reference (455) to the possibility of being burned? A. No, sir.

Q. Did you notice anything unusual about him? A. Not to my recollection.

Q. All right.

Now, Mr. Burrell, after Mr. McCray was seen at the dispensary or hospital, what, if anything, else took place? A. Mr. McCray was placed in the mental observation unit.

Q. And this is where in relation to the general Penitentiary? A. It's on the fourth floor of the hospital on the west end.

Q. And the hospital is on what floor? A. Sir?

Q. The hospital is on what floor? A. Well, the hospital has four floors, the dispensary where he was treated was on the first floor.

Q. And what, if anything, thereafter did you do, was there anything else that you did? A. I can't remember specifically doing anything particularly after him being checked by the nurse on duty and having placed in the mental observation unit.

Q. And he was placed in the mental observation unit as a result of you request, is that correct, sir? (456) A. My order, sir, not my request.

Q. Your order.

Now, why was he placed in the mental observation unit? A. In my opinion, had he been returned to the south wing, he would have continued to create another disturbance, which I wished to prevent due to the fact that this was a weekend and I would want to prevent it in any event, however, on the weekend where we are

working with a short staff, it would be detrimental to the security and control of the institution if I allowed him to go back there and create another disturbance, which I thought perhaps could be done.

Q. Now, was he stripped at the time he was placed in the mental observation cell? A. Yes, sir.

Q. And what was the reason for this? A. The reason for this, in my opinion, I felt that this setting of this cell on fire was not a rational act and I was responsible for his well being as well as everything else in that Penitentiary, therefore, I ordered it.

Q. So, in your opinion, this was a precautionary measure? A. Yes, sir.

Q. Did you at any time refuse him any medical services? (457) A. No, sir.

Q. Did you at any time place him in a mental observation unit for punishment? A. No, sir.

Q. Now, Mr. Burrell—

(Mr. Rosenthal) Excuse me one second, Your Honor. We have copies of records, but I think maybe these are originals.

By Mr. Rosenthal:

Q. Well, Mr. Burrell, I show you photostatic copies of pages that are numbered 51, 52 and 53.

While counsel is looking at those, can you tell me where those records were obtained? A. Those are copies of the log book that's kept by the fourth floor officer.

Q. Fourth floor of what? A. Of the hospital, sir.

Q. Which is the mental observation unit? A. That includes the mental observation unit, and the tubercular ward, I think, and right now I believe they're using it as a psychological ward, also, they have the Psychological Department located up there now.

Q. Now, Mr. Burrell, in whose handwriting is this kept? A. The officer's handwriting, sir.

(458) Q. And is this record kept in the ordinary course of business of the Penitentiary? A. Yes, sir.

Q. And is it retained by the Penitentiary as a business record made in the ordinary course of business? A. Supposedly.

(Mr. Rosenthal) Your Honor please, there are approximately five written marks in red ink on these papers, which are Mr. Burrell and my markings, which are just check marks and numbers which were not made in the ordinary course of business, but other than that, we would move that these records be introduced into evidence as the Defendant's exhibits, either 1A, B and C, or whatever numbers.

(The Court) Well, you've got one exhibit in now, haven't you?

(Mr. Rosenthal) I'm sorry, I guess it would be 2, Your Honor, A, B and C.

(Mr. Morgan) Your Honor, the Plaintiff objects to the introduction of these exhibits on the grounds that these exhibits are part of the mental observation log book which we requested on motion for production of documents and which was ordered to be produced by this Court two weeks ago.

We also served a subpoena on Mr. Walters of the Penitentiary and requested that he bring the log book from (459) mental observation here on Monday at 10:00 o'clock. Other documents were brought, these documents were not brought. This is the first time we've seen these documents and we would object to them on those grounds.

(The Court) Counsellor, why weren't these documents produced in accordance with the order?

(Mr. Rosenthal) If Your Honor please, I have no idea. I was under the impression that they had. I tried to work, and Mr. Morgan will verify this, very closely with Mr. Morgan and with Mr. Frenkil in our office who represents the institution to make sure that Mr. Morgan received every exhibit that he so subpoenaed.

We have given, as a matter of fact, Mr. Morgan every file that we have here today, and I was under the impression that he had seen these, but that they did not leave the Penitentiary, as such.

(The Court) Well, I'll permit them in, but I want — when I have ordered documents produced, I want them produced.

(Mr. Rosenthal) We will get copies for Mr. Morgan and I do point out to the Court for the record that these are dated, the two days, the six shifts that Mr. McCray testified that he was in the mental observation unit.

(The Court) All right.

(Mr. Morgan) Your Honor, if these documents are to (460) be introduced, I think that all the documents from the log of mental observation concerning the days Mr. McCray was in that unit should also be produced.

It was Mr. McCray's testimony that he recalled being in the unit approximately two days. I think the log book will show that he was there three, possibly four days, and I think all those records should be introduced at this point.

(Mr. Rosenthal) These records, Your Honor, show the time and date that Mr. McCray was admitted to the mental observation on January 1st, the time and date that he was released to go back to the south wing.

(The Court) Those are all the documents relating to McCray at that particular time?

(Mr. Rosenthal) That is correct, Your Honor.

(The Court) Well, if there are any other documents that Mr. Morgan wishes to see, he may do so.

(Mr. Rosenthal) Yes, he may see them, Your Honor, sure, we have no objection, and as stated, and I think Mr. Morgan will back this up, that we tried to cooperate 100 per cent.

(The Court) All right.

(Mr. Rosenthal) I apologize to Mr. Morgan and I know of no reason why he had not seen these.

(The Court) All right.

(461) 2A is Page 51, 2B is 52, and C is 53.

Okay?

(The Clerk) Yes, sir.

So marked, Defendant's 2A, B and C.

(Documents were marked Defendant's Exhibits Numbers 2A, B and C.)

(Mr. Morgan) Your Honor, since there are no copies in court today, would we be able to use the actual exhibits for cross-examination, we've never had an opportunity even to read them?

(The Court) Sure.

(Mr. Morgan) Thank you.

(Mr. Rosenthal) I had not seen them before this morning, either, Your Honor, that's why there are no copies available.

(Mr. Morgan) Thank you.

(The Court) Well, wait a minute, you can use them on cross.

(Mr. Rosenthal) All right.

By Mr. Rosenthal:

Q. Now, Mr. Burrell, you have heard the colloquy that just took place with reference to these records.

Are these, in fact, the records about which you were speaking? A. Yes, sir.

(462) Q. And would you please read on Page 51 the time and date that Mr. McCray was admitted to the mental observation unit? A. January 1, 1972, 9:45, Inmate Milton McCray was admitted to the MO unit from segregation, making count eight.

Q. And would you read, if you will, the time and date that Mr. McCray was released? A. January 3rd, 1971.

(The Court) '71 or '72?

(Mr. Rosenthal) It should be '72, Your Honor, but the paper does, in fact, state '71.

(The Witness) It states '71, sir.

The officer evidently made a mistake. The entry above it on the 12:00 to 8:00 shift says 1/3/72. This is the 8:00 a.m., 0800. Made security round of MO, mental observation unit and found it safe and secure. Count eight. Unit—

(Mr. Morgan) Excuse me, Mr. Burrell, what day is this you're reading?

(The Witness) 3 January.

Cleaned up at this time. Milton McCray 110563 discharged to south wing escorted by A. Johnson. Count is now seven. All patients were fed in unit at this time.

(463) By Mr. Rosenthal:

Q. All right.

Now, Mr. Burrell, I show you Page 52, which is Exhibit 2B, and ask you if you will read from January 2nd, 1972, the entry at 0800 and the entry at 10:45, both being a.m., and the entry at 3:30 p.m.? A. The first entry, 0800, Milton McCray received medication as prescribed. Water was given out in MO unit.

10:45, regular diet cart to MO.

(The Court) What?

(The Witness) Regular diet cart to MO. All inmates were fed.

3:30, made final check of MO and men in unit and found everything to be in a satisfactory and secure being. Count in MO unit, eight.

Signed by R. P. Stanton, COII.

(The Court) And he was released at 8:00 a.m. on January 3rd?

(Mr. Rosenthal) That's correct, Your Honor.

(The Court) All right.

By Mr. Rosenthal:

Q. Now, Mr. Burrell, in your capacity as the Duty Captain, 8:00 to 4:00 shift, did you receive any reports from officers pertaining to this incident? A. Yes, sir.

(464) Q. And did you receive a report from Sgt. Martin dated January 1, 1972? A. Yes, sir.

Q. And do you recall Sgt. Martin's position with the institution at that time? A. Sgt. Martin was assigned to the hospital in the dispensary as a Medical Officer.

Q. Now, Mr. Burrell, I show you a copy of the report and ask you if you can identify that, sir? A. This is a copy of Sgt. Martin's report to me as Shift Commander.

(Mr. Rosenthal) And we would move, Your Honor, counsel does have copies of all these records, that this be introduced as Defendant's Exhibit Number 3.

(The Court) What is it?

(Mr. Rosenthal) A report relating to the fire, Your Honor, and the treatment of Mr. McCray at the dispensary by Sgt. Martin.

(The Court) All right.

(Mr. Morgan) We have no objection to this, Your Honor.

(The Clerk) Marked as Defendant's Exhibit Number 3.

(Document was marked Defendant's Exhibit Number 3.)

(The Court) Okay.

(465) By Mr. Rosenthal:

Q. Now, again, with relation to this incident, Capt. Burrell, I show you a report from Sgt. Witte, to whom I think you made reference in your testimony, can you identify that, sir? A. This is the formal report of this incident to me from Sgt. Witte.

(Mr. Rosenthal) We would ask that this be introduced into evidence, Your Honor, as Defendant's Exhibit Number 4.

(Mr. Morgan) This particular report, Your Honor, we would have an objection to on the grounds that there has been no basis laid here for this being a business record kept in the ordinary course of the operation of the Penitentiary.

It appears to me to be a — well, as a matter of fact, it's not even to Capt. Burrell, it's to the Warden from Sgt. Witte, it appears to me to be a letter and nothing indicating that this is a record ordinarily kept.

(The Court) Lay the foundation, Counsellor.

(Mr. Rosenthal) Your Honor please, we would — the report itself is within the base file of Mr. McCray, as are all these exhibits, Your Honor, but let me go into the foundation.

(466) By Mr. Rosenthal:

Q. Captain — Mr. Burrell, in your position as Captain, Duty Captain, 8:00 to 4:00 shift, was it your duty to receive these reports from officers? A. It was my duty to see that they were made and that everything, all information was relayed to the Warden. Each officer would be required on any incident to make a report and I would file a cover report, and especially in the area of weekends and holidays, that would be on his desk when he came to work, unless it would be of such importance that I would have to inform him at home.

Q. Now, was it the obligation and duty of the officers to make these reports of any incidents in the Penitentiary in the normal course of their business as officers of the Penitentiary? A. Yes, sir, it is their duty to do so.

Q. And were these records or reports so made? A. Yes, sir.

(The Court) And were kept in the ordinary course of business?

(The Witness) I beg pardon, sir?

(The Court) And were they kept in the ordinary course of business?

(The Witness) When I operated the shift, everything was documented.

(467) (The Court) All right.

Objection overruled.

(Mr. Morgan) Your Honor, if I may cite the Court to a legal authority on the objection that I made.

Particularly the case of Bracey versus Herringa, and I don't have the F.2d cite on it, but it's a Seventh Circuit case, decided August 3rd, 1972, the Court there said, the policy permitting the admission into evidence of records

made in the regular course of business is based on the trustworthiness and reliability of that kind of records.

Then further in the next paragraph states, we conclude that it was error for the District Court to accept in support of the Defendants — the Defendants in this case who were prison Correctional Officers — the motion for summary judgment, prison records which included the self-serving statements of the Defendants themselves, as well as statements of other prison guards who were subject to possible Civil Rights Acts liability. This kind of record lacks reliability and trustworthiness.

We would say that this is a sound statement of the law with regard to this, Your Honor.

(The Court) Well, if it is, it's one of the few sound decisions coming out of the Seventh Circuit, I don't consider myself bound by it, and the objection is overruled.

(Mr. Morgan) All right, sir.

(468) (The Clerk) Marked as Defendant's Exhibit Number 4.

(Document was marked Defendant's Exhibit Number 4.)

(The Court) All right.

By Mr. Rosenthal:

Q. Now, Capt. Burrell, again, in the ordinary course of business at the Penitentiary, I show you a report from Corporal Alston and ask if you can identify that? A. This is a report from Mr. Alston, who was the Segregation Medical Officer, dated January 1, it's to the adjustment team and it's headed, information and evaluation.

Q. Now, was that kept in the normal course of business? A. Yes, sir.

Q. And was it Corporal, or Mr. Alston's duty as Segregation Medical Officer to supply this type of a report? A. Yes, sir.

Q. And was it your duty in the normal course of business of the institution to receive such a report? A. Yes, sir.

(Mr. Rosenthal) If Your Honor please, we would introduce this as Defendant's Exhibit Number 5.

(Mr. Morgan) Your Honor, the Plaintiff objects again on the same grounds as before and, in addition, on this particular exhibit, the heading at the top states, The Maryland (469) Penitentiary, directly under that it states, Special Report, January 1st, 1971.

It seems absolutely clear to me that this is not a record kept in the normal course of business, it's a special report, in fact, and, therefore, should be excluded.

By Mr. Rosenthal:

Q. Captain Burrell, if I may, on this point, can you define a special report? A. Well—

Q. That is kept in the ordinary course of business at the institution? A. I think that this was out of the ordinary, things of this nature being sent to the Warden generally are headed, special reports.

Q. And is that the reason why that was so— A. I would imagine so.

Q. —titled?

(The Court) Objection overruled.

(The Clerk) Marked Defendant's Exhibit Number 5.

(Document was marked Defendant's Exhibit Number 5.)

(The Court) All right.

By Mr. Rosenthal:

Q. The last exhibit I have, Captain Burrell, and ask if you would just identify this paper? (470) A. This is a report from Major F. R. Clingenpeel, Shift Commander, 4:00 to 12:00 shift, to me as Duty Captain on the 8:00 to 4:00 shift, dated January 4, 1972.

Q. And was this record kept in the ordinary course of business? A. I would believe it's necessary that the Shift Commanders and the Duty Captains have knowledge of what happens prior and before each shift.

Q. And was this a memo to you, or directive? A. It was a memo to me for my information.

Q. With reference to what? A. With reference to Inmate Milton McCray, receiving treatment.

Q. That's all.

In this particular instance — and this is dated January 4, 1972? A. Yes, sir.

(Mr. Rosenthal) Your Honor please, we would ask that this be introduced as, I think it's Defendant's Exhibit Number 6.

(The Clerk) Marked Defendant's Exhibit Number 6 in evidence.

(Document was marked Defendant's Exhibit Number 6.)

(471) By Mr. Rosenthal:

Q. Now, Mr. Burrell, you heard Mr. McCray testify with reference to his failure to report to the library or to work on January 31st, 1971, is that correct, sir? A. Yes, sir.

Q. Is there an inmate rule book which is given out to the inmates? A. Yes, sir.

Q. And I show you a book here with a blue cover and ask if you can identify this book? A. That is the current rule book for inmates at the Penitentiary. In addition to that, we have the yellow book that is overall from the Division Headquarters.

Q. Division of Correction? A. Yes, sir.

Q. For all the institutions? A. Yes, sir.

Q. But this pertains specifically to the Maryland Penitentiary? A. Yes.

Q. Now, I call your attention to Pages 12, 13 and 14 of this book relating to violations which are subject to hearing before the adjustment team, and ask you if you can identify Item Number 16? A. Item 16, delaying security count.

(472) Q. What does that mean, Mr. Burrell? A. It means that this is an infraction of the rules of the Maryland Penitentiary.

Q. And what encompasses the delaying of the security count?

(Mr. Morgan) I object to this line of questioning, Your Honor, unless Mr. Burrell is willing to state that this rule book was a rule book that was in effect at the time we're talking about, December 30, 1971.

My understanding from the testimony yesterday is, regarding the same rule book, it came into effect last summer, in August of 1972.

By Mr. Rosenthal:

Q. Mr. Burrell, do you know whether, in fact, that this was or was not in effect— A. I don't believe that particular book was in effect, sir.

Q. It was not.

Do you recall of your own knowledge, of your own personal knowledge, whether or not it was a violation of the rules in the Maryland Penitentiary in December, 1971, for someone to miss a security count? A. It certainly was.

Q. And what does the missing of a security count encompass? (473) A. Well, missing of a security count means, number one, that the inmate is not at his assigned place.

Now, it is taken at that time by the Shift Commander, or whoever gets the information, and you then must search the institution until you find this inmate, and you assume, of course, the possibility of escape, the possibility that he has been hurt, that he is sick, anything that could possibly keep him from being where he's supposed to be at that time.

Q. All right, and Mr. McCray at that time was in the general population, is that correct? A. Yes, sir.

Q. And if, in fact, he was not to work on that date, he still would be subject to the security count? A. Yes, sir.

Q. And I believe there has been testimony in these cases that the Maryland Penitentiary is the maximum security institution for the State of Maryland? A. That is correct.

(Mr. Rosenthal) Your Honor please, we would have no other questions, and Mr. Morgan's witness.

CROSS EXAMINATION

By Mr. Morgan:

Q. Mr. Burrell, it was your order that placed the Plaintiff, Milton McCray, into the mental observation unit, (474) isn't it? A. That is true.

Q. Mr. Burrell, if I may direct your attention to several of the exhibits that were introduced during the direct examination.

Specifically, the memorandum to you from Sgt. H. L. Martin, listed as Dispensary Officer, do you know Sgt. Martin? A. I beg pardon?

Q. Did you know Sgt. Martin at the time? A. Yes, sir.

Q. Do you know what qualifications, if any, Sgt. Martin has to be a Dispensary Officer? A. Well, Sgt. Martin has for quite some time been a Red Cross instructor in first aid, he is used not only by the Penitentiary and the Division, but also, I believe, he has outside interests in this area, and, if I'm not mistaken, he also was requested to teach first aid at the City Jail.

Q. All right, sir.

The report states, sir:

At about 9:40 a.m., this date, Inmate McCray, Number 110563, was escorted to the dispensary for treatment. Inmate McCray stated that his cell had caught on fire and that he had swallowed smoke. He further stated he was having (475) difficulty in breathing. This officer could not detect any difficulty in his breathing. His respiration was normal (20), pulse slightly rapid but well within normal range. Speech was good, that is, no slurring of speech, rather a loud

demanding tone of voice. He further stated he burned his neck and right hand. No blisters detected. Patient was treated with cold compresses to areas of neck and hand where he stated he was burned. His eyes, nose and ears irritated as a preventive measure and eye-mo applied to eyes to safeguard against irritation.

Respectfully submitted, Sgt. Martin.

This memorandum refers to the medication that McCray received at 9:40 a.m. on January 1st, doesn't it? A. It refers to the treatment he received at that time.

Q. Fine.

There is also a report here directed to the Warden, which you received a copy of, from Sgt. Witte.

What was Sgt. Witte's position at that time? A. Sgt. Witte was the officer in charge of the south wing segregation unit.

Q. It was Sgt. Witte's duty to make sure that south wing operated correctly, wasn't it? A. Yes, sir.

Q. If an inmate were to be injured in his cell, that (476) would be Sgt. Witte's responsibility, wouldn't it — I'll withdraw that question.

Wouldn't Sgt. Witte be responsible to the Warden for explaining why an inmate was injured in his cell, if that occurred during Sgt. Witte's shift? A. He would also be responsible to me, primarily, in that I was the only one there at that time on the weekend, there was no Warden, no Deputy, no Major, which is a common occurrence.

Q. Sgt. Witte would have to explain to you what happened, and why? A. Yes, certainly, he would have to explain to me.

Q. Now, Mr. Burrell, you are familiar with the mental observation unit, is that correct? A. Yes, sir.

Q. On January 1st, 1972, and I'm directing your attention now to Page 51 of this copy from the log books, signed by Sgt. Stanton, 0800, relieved Officer Lazoskie and checked MO and found all to be in order, all inmates alive and well. Count in MO, seven patients.

Has it ever been your experience, Mr. Burrell, that an inmate has died in MO? A. Yes, sir.

Q. Do you recall when that was? A. I don't—

(477) (Mr. Rosenthal) I object, Your Honor, unless there's some relevancy.

(The Court) Objection overruled.

Go on.

(The Witness) I don't remember the date.

By Mr. Morgan:

Q. Do you recall the circumstances? A. Yes, sir.

Q. Mr. Burrell, you testified on direct examination that as Duty Captain, I believe, for the day shift, is that the proper title? A. That's correct.

Q. You were responsible for the operation of the entire institution, is that correct? A. The control and security of the institution.

Q. Were you also responsible for the hospital area? A. As far as control and security of it, yes, sir, not for the medical operation.

Q. Were there any regulations, written regulations, in the Penitentiary on January 1st of 1972 governing the use of mental observation cells? A. I think so, sir.

Q. I show you this directive, Directive Number 1270, from the Commissioner of Correction, Deputy Commissioner of Correction, is that the directive that was in effect at that (478) time? A. I believe it's dated August 10th, 1970, I do not know, effective 8/10/70, it would be in effect.

(Mr. Morgan) All right, sir.

We would introduce this as a Plaintiff's exhibit.

(The Clerk) Marked as Plaintiff's Exhibit Number 3.

(Document was marked Plaintiff's Exhibit Number 3.)

By Mr. Morgan:

Q. Now, Mr. Burrell, I refer your attention to the very last sentence of this directive. A. Just a moment, sir, I don't have a copy.

Q. Oh, well, I was going to read it to you.

(Handed.)

The last paragraph, in fact:

In the absence of the psychologist or psychiatrist, an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified. The psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four hour period.

My question, Mr. Burrell, in this particular case, was the psychologist or psychiatrist notified within twenty-(479) four hours of the time that Mr. McCray was placed in the mental observation? A. I cannot answer that, I do not know, I don't remember.

Q. You didn't notify a psychologist or psychiatrist yourself, did you? A. I don't remember, sir.

Q. There's nothing in your records that indicate you did, is there? A. The few records that I could find.

Although it does say in my report that, in my opinion, inmate is not psychotic and that I placed him there for his own protection.

Q. Didn't you testify on direct, Mr. Burrell, you placed him there for the control of the institution because you felt that to place him over the weekend would cause a security problem? A. Well, then, also, it's for his own protection, maybe I forgot to mention it, I don't know.

Q. Well, the directive specifically says:

An inmate may be placed, et cetera, in isolation cell, for his own safety or that of the inmate population.

And that's what happened in this case, isn't it? A. If I put him back in the south wing and he burned up another cell, where would I be, now is that his own (480) protection, or not?

Q. It clearly is.

Thank you.

Now, Mr. Burrell, you testified you saw the Plaintiff in the hospital, in the dispensary area, I believe? A. I saw him down there somewhere, I can't remember where.

Q. Was that the morning of the fire? A. It was sometime in that general time area, I don't know.

Q. Was that — it was that same day, wasn't it? A. Certainly.

Q. You testified on direct examination, Mr. Burrell, that starting a cell fire is not a rational act and that you were responsible for the Plaintiff's safety and, therefore, you placed him in the mental observation.

Did you have an opportunity to view this cell after this incident? A. Yes, sir, but I don't remember exactly the time.

Q. Did you have an opportunity to talk to any of the inmates who were in the cells next to the cell that burned? A. I don't remember talking to either one, or if there were anybody in those cells.

Q. Do you recall talking to any officers about this? (481) A. I can't recall if I talked to any specific officer about it, I know without doubt that I did, but who he was or what was said, I can't remember.

Q. Do you recall conducting any kind of an investigation to determine the cause of this fire? A. What do you mean, I'm sorry?

Q. Do you recall conducting any kind of an investigation to determine the cause of the fire? A. Other than my interview with McCray, I can't remember anything.

Q. When was your interview with Mr. McCray, Mr. Burrell? A. It was the day of the fire, sometime that morning, I would assume, but I can't even definitely state that.

Q. Do you recall where that interview took place? A. In the hospital.

Q. What did you — well, during that interview with Mr. McCray, did you explain to him that you were going to put him in the mental observation? A. I don't remember.

Q. Do you recall the substance of your conversation with McCray? A. The best that I can give you, Mr. Morgan, is what I have in my report.

Q. Mr. Burrell, during this period of time, when a (482) situation arose where it occurred to you that possibly an inmate was eligible to be put in mental observation, were there any written standards that guided you in making that kind of a determination? A. I don't remember whether there was, or not. If there wasn't, there should have been.

Q. During this period of time, Mr. Burrell, did you have an opportunity to put any other inmates into mental observation? A. I'll have to check the record.

Q. Well— A. As far as I know—

Q. Do you recall ever having ordered another inmate to mental observation? A. I don't recall the specific incident, but I imagine it has been done.

Q. Well, Mr. McCray is not the only inmate you've ever placed in mental observation, is he? A. No, sir, I wouldn't say he was, but I wouldn't say that I have direct knowledge at this time if I placed so-and-so in mental observation for any particular reason.

Q. But you can recall having placed unidentified inmates at this time in mental observation? A. I suppose I have at one time or another placed some inmate in every part of that institution, for some reason.

(483) Q. Was it your practice when you placed inmates into mental observation to order that their clothing be removed? A. If I felt it was necessary, yes, sir.

Q. Now, was it your practice to instruct the hospital to remove the mattress from the mental observation? A. I would not allow anything in that — if this man, in my opinion, needed to have his clothes removed from him, then he needed to have the mattress, or whatever else might be in there, removed also.

Q. Now, in this particular case, do you recall at any time between the morning of January 1st and the morning of January 3rd checking back with the hospital to

obtain information about Mr. McCray's physical condition? A. Specifically, no.

I just cannot remember, but it is my practice, and it is still the practice, that the supervisory officers on the shift will visit every area of the institution during their shift.

I don't know whether I went to MO, whether the Lieutenant went up there, whether we both went, or perhaps the two Lieutenants and I, I just can't say.

Q. During the time Mr. McCray was in mental observation, he was still in the Penitentiary, wasn't he? A. Absolutely.

Q. And having been put there by you, he was your (484) responsibility, wasn't he? A. Everybody inside those walls is my responsibility.

Q. Did you issue the order that removed Mr. McCray from mental observation? A. I don't remember.

Q. Mr. Burrell, have you ever seen a cell fire at the Maryland Penitentiary, other than this one that has been described? A. Yes, sir.

Q. In terms of intensity and seriousness, how would you rate this particular fire with the— A. To be right frank with you, Mr. Morgan, it scared the hell out of me.

Q. Was it about the worst one you've ever seen? A. It's a wonder that the entire block was not burned, if it hadn't been for the quick action by the officers, we possibly would have lost quite a few inmates there.

Q. Mr. Burrell, I show you a series of six photographs, can you identify each one of these photographs, please? A. These are photographs that were given to me at my request by Lt. Donald Shields, and I don't know if he is with the Penitentiary or with the Reception Center at the present time. But he is the officer in charge of the Identification Department, and his photographer, or he, I (485) don't know which, took these photographs.

Q. What are they photographs of? A. These are photographs of the cell that was burned.

(Mr. Morgan) Do you have any objection to these, Mr. Rosenthal?

(Mr. Rosenthal) None.

(Mr. Morgan) Your Honor, we would offer these as Plaintiff's next exhibits, and perhaps Mr. Burrell could describe each one in order as we introduce them.

By Mr. Morgan:

Q. First, Mr. Burrell, what is this photograph? A. This photograph was evidently taken from the front of the cell, it shows the bed on the left, what looks to be a blanket hanging over the corner of the bed, a wall locker that is leaning against a broken toilet, and on the lefthand side a broken sink partially remaining on the wall.

Q. All right, do the walls appear to be charred there, or is that the normal condition of those walls? A. They're smoked up very bad.

Q. Okay.

How about the next one?

(The Clerk) Can I mark them as you give them?

That will be Plaintiff's 4A. These will all be in evidence.

(Photograph was marked Plaintiff's (486) Exhibit Number 4A.)

(The Witness) This is a photograph evidently taken by the photographer standing on the end of the bed looking down in the corner where the broken sink partially remains on the wall.

By Mr. Morgan:

Q. And, again, the walls are in that condition because of the smoke, apparently? A. Well, that is not the regular condition of those walls.

Q. I see.

You saw the cell after the fire, didn't you? A. Yes, sir.

Q. Was it your opinion in viewing the appearance of the cell that these marks were caused by smoke? A. I

don't know what caused it, smoke, flame, or what it was.

Q. Caused by fire, though? A. In my opinion, yes, sir.

(Mr. Morgan) All right.

(The Clerk) Plaintiff's 4B.

(Photograph was marked Plaintiff's Exhibit Number 4B.)

By Mr. Morgan:

Q. What does the next one show? (487) A. This is a shot of the tier from, evidently, in front of 323, looking down the tier, and it shows the cell door open, it's smoked at the top and bottom, and some evidence of smoke on the top or the bottom of the fourth tier, which would be under the sides, or something.

(Mr. Morgan) All right, sir.

(The Clerk) Plaintiff's 4C.

(Photograph was marked Plaintiff's Exhibit Number 4C.)

(The Witness) This is apparently a picture taken from the opposite direction on the tier.

(Mr. Morgan) All right, sir.

By Mr. Morgan:

Q. What is the next one?

(The Clerk) Plaintiff's 4D.

(Photograph was marked Plaintiff's Exhibit Number 4D.)

(The Witness) A picture of the bed and corner of the cell.

By Mr. Morgan:

Q. Are those markings there from your recollection, having seen this first-hand, signs of the fire damage, as well? A. Yes, sir.

(The Clerk) Plaintiff's 4E.

(488) (Photograph was marked Plaintiff's Exhibit Number 4E.)

By Mr. Morgan:

Q. And this would be the final one of this series of pictures, what does that show? A. This is a picture taken from the back of the cell looking out the cell door, at the bottom, the third of the cell door, quite a bit of debris piled in front of the door.

Q. Where is the bed in this picture, Mr. Burrell? A. The bed would be on this side, evidently has been — back against the wall, out of the way for the picture.

Q. Which is why it doesn't show in this picture? A. I would imagine so.

Q. And, again, the markings on the wall and the floor are caused by the fire, fire damage? A. I don't know about on the front, but, evidently, it's burned on both sides of the door.

Q. On the wall? A. Yes, sir.

(Mr. Morgan) All right, sir.

(The Clerk) Plaintiff's 4F.

(Photograph was marked Plaintiff's Exhibit Number 4F.)

(489) By Mr. Morgan:

Q. Mr. Burrell, were you familiar with the material that the mattress in Mr. McCray's cell was made of? A. No, sir, I'm not.

Q. You're not familiar with that material? A. No, I'm not.

In that particular unit, mattresses are destroyed quite regularly and I do not — it could have been one of two types of mattresses, they have a foam rubber mattress, I believe it is, and also the older mattresses are — I don't know what's in them, cotton, or something.

Q. Well, perhaps by looking at this photograph again, I can refresh your memory of what was in Mr. McCray's cell.

(Mr. Rosenthal) Your Honor please, unless the witness can identify the material from the picture, I think he has already testified he didn't know which kind—

(Mr. Morgan) That's what I'm going to ask him, if he can't.

By Mr. Morgan:

Q. Does that appear to be a foam rubber kind or a cloth kind? A. If this is the mattress on top, it appears to be the foam rubber.

Now, I do not know that that — that this particular mattress was — also something underneath of the pile that has (490) striping on it similar to what the other mattresses are.

Q. I see.

All right, sir.

This particular situation, Mr. Burrell, you had personal knowledge that Mr. McCray had suffered injury as a result of this fire, didn't you? A. Sir?

Q. When you saw Mr. McCray in the hospital on January the 1st, at that time you gained personal knowledge that Mr. McCray had suffered injury as a result of this fire, didn't you? A. According to my reports, he was not burned, there was no evidence of it. Sgt. Martin's report states—

Q. Well, doesn't Sgt. Martin's report also show that he received — I'm not sure that that's what it states. A. Well, sir, you have that, please read it.

Q. All right, sir.

The last two sentences state:

Patient was treated with cold compresses to areas of neck and hand where he stated he was burned. His eyes, nose and ears irritated as a preventive measure and eye-mo applied to eyes to safeguard against irritation.

Is it your recollection that Mr. McCray had suffered some injury as a result of this fire? A. No, sir.

(491) Q. Mr. Burrell, I believe your prior testimony was that you don't recall anything about this incident except what's in the reports, is that right? A. Frankly, I had forgotten about it completely until this matter came up.

Q. Of your own personal knowledge, Mr. Burrell, did Mr. McCray see a doctor during the two days he was in MO? A. I don't know.

Q. Again, to your personal knowledge, did Mr. McCray have an interview or see a psychologist while he was there? A. I don't know.

I will remind you that that was the 1st and 2nd of January, it was a weekend.

Q. Mr. Burrell, to save time, rather than ask you a direct question concerning the condition of MO, you heard Mr. McCray testify about what the cell looked like, the construction, the color, the hole in the floor, is that substantially the way— A. It's a bare cell. The mattresses are available. There is what is known as an oriental toilet in the floor, it flushes automatically on a time sequence, I think every three to five minutes, or so. The cell windows on that particular side of the institution were covered with sheet metal of some sort due to some incident that took place, I've forgotten now what it was, that the security screens were not (492) sufficient to secure the window, therefore, they were covered.

Q. The cell was absolutely barren, except for the hole in the floor with the grate on it, is that right? A. If those officers did their job, that's the way it was.

Q. Do you specifically recall Cell Number 8 having the window in the cell being blocked over with a metal sheet? A. No, sir, that entire side was blocked over, and I'm not sure the date when it was done.

Q. There were no windows in any of the cells up there? A. The windows are there, they're covered over with a piece of sheet metal due to the fact that the security screens were bridged by some means.

Q. I just have one or two other questions, Mr. Burrell.

Can you identify this book? A. It says, the desk log on shifts, January 1, 1972, through January 13th, 1972.

Q. Do you know what this book is? A. It's a log book.

Q. Do you know for what section of the institution, it's from the Penitentiary? A. I don't know.

(493) Q. Could you examine it and try to determine if you can identify it? A. Yes, sir, it's evidently from the south wing, segregation unit.

Q. South wing log book? A. It's so indicated on the front.

Q. All right, sir.

(Mr. Morgan) We don't intend to introduce this whole book into evidence, Your Honor, but I would like to have Officer Burrell, with permission of counsel, read one entry on Page 1, Saturday, January 1st, 1972, 8:00 to 4:00 shift.

By Mr. Morgan:

Q. Eight to four, I assume means 8:00 to 4:00 shift, is that right? A. That is correct.

Q. About five-sixths of the way down the page, an entry with a star next to it, that says, 9:20, Milton McCray set his cell and contents on fire, he was removed from cell and escorted to MO per Capt. Burrell.

Is that an accurate statement of what that says? A. Yes.

Q. And that's an entry in this log book at 9:20 a.m. on January 1st of 1972, isn't it? A. It's there.

(Mr. Morgan) Okay, sir.

(494) I have no other questions, Mr. Burrell.

Thank you.

(Mr. Rosenthal) Just two short questions, Your Honor.

REDIRECT EXAMINATION

By Mr. Rosenthal:

Q. Number one, Mr. Burrell, when you made mention of the fact that you removed Mr. McCay's clothing and the mattress from the — was it the MO, or the — yes, the mental observation cell? A. When I removed it?

Q. No, when you ordered that it be removed? A. Yes, sir.

Q. And this was for what reason? A. For his own protection, as well as mainly — Mr. Morgan made reference to a man dying up there, I don't know which one they had, but I did have occasion where a man hung himself in that area, and it was not going to happen to me if I could help it.

Q. You mean by the use of— A. By the use of a mattress cover.

Q. Or his clothing? A. Well, he could very well have used his clothing, had he had any.

Q. Mr. Burrell, I show you one last paper, first of (495) all I show you this group of papers and ask if you can identify this folder? A. This is the weekend and holiday activity report, 1972-1973.

Q. And these are records of the Penitentiary? A. Yes, sir.

Q. Which are kept in the ordinary course of business? A. Yes, sir.

Q. And I refer you to report dated January 3, 1972, by whom is that report signed? A. Signed by me.

Q. And it's addressed to whom? A. Mr. Leonard F. Decker, Warden.

Q. And would you please read the entry with reference to security — the first line of the security information? A. MO was bathed, shaved, and given haircuts on January 1, 1972, by Officers Ebert, R. Stanton, Leak and Carpenter.

Q. Would there be any reason that any one person in the mental observation cells would not be bathed? A. Not to my knowledge.

(Mr. Rosenthal) No further questions, Your Honor.

Your witness.

(Mr. Morgan) No other questions, Mr. Burrell.

(496) (The Clerk) That's all, sir.

(The Court) All right.

Any other witnesses?

(Mr. Rosenthal) We have Mrs. Weber here, who is the nurse.

(The Court) All right.

(Mr. Rosenthal) Mrs. Weber, please come up, take the stand, please.

END OF VOLUME I